



## STAFF REPORT

### TOWN COUNCIL MEETING OF JUNE 11, 2013

To: Town Council

From: Town Manager

Date: June 3, 2013

Subject: Representation Agreement with Communication Management Associates, Inc. (CMA)

**RECOMMENDATION:**

Approve Agreement.

**DISCUSSION/BACKGROUND:**

At the April 9, 2013 Town Council meeting, Town Council discussed a proposal by Communication Management Associates, Inc. (CMA) to represent the Town in seeking leases with carriers (such as AT&T or Verizon) to utilize existing and future Town assets (traffic signals, street lights, property) to install small antennas for wireless communications, Distributed Antenna Systems (DAS), and microcells for 4G connectivity. The Town Council directed staff and Legal Counsel to prepare an agreement with CMA for Town Council approval.

The objective of this agreement is to accomplish three key goals:

- 1) Find revenue opportunities within the Town using existing assets
- 2) Find cost savings using 4G wireless technology and infrastructure
- 3) Find potential opportunities to fund future infrastructure needs such as street lights

**CEQA :**

The proposed participation agreement is exempt from CEQA.

**FINANCIAL IMPLICATIONS:**

There is no financial impact to the Town at this time. There is a potential for revenue through future lease agreements should the Town enter into an agreement with CMA.

**Attachments:**

CMA Agreement

## CONTRACT FOR SERVICES

THIS CONTRACT is made on \_\_\_\_\_, 20\_\_\_, by and between the TOWN OF LOOMIS ("Town"), and Communications Management Associates, Inc., a \_\_\_\_\_ corporation ("Consultant").

### WITNESSETH:

WHEREAS, Consultant proposes to provide certain services to the Town related to the marketing of Town property and the installation, operation and maintenance of wireless communication equipment on that property, as more particularly described in the "Scope of Services" attached hereto and incorporated herein as **Exhibit "A"**; and

WHEREAS, Consultant has represented to Town that is duly licensed, qualified and experienced to perform those services;

WHEREAS, Town and Consultant are prepared to enter into an agreement by which Consultant will perform the services set forth in **Exhibit "A"** on the terms set forth herein.

NOW, THEREFORE, the parties hereto mutually agree as follows:

#### 1. SCOPE OF SERVICES:

A. Consultant shall do all work, attend all meetings, produce all reports and carry out all activities necessary to completion of the services described in **Exhibit "A"**. This Contract and its exhibits shall be known as the "Contract Documents." Terms set forth in any Contract Document shall be deemed to be incorporated in all Contract Documents as if set forth in full therein. In the event of conflict between terms contained in these Contract Documents, the more specific term shall control. If any portion of the Contract Documents shall be in conflict with any other portion, provisions contained in the Contract shall govern over conflicting provisions contained in the exhibits to the Contract.

B. Consultant enters into this Contract as an independent contractor and not as an employee of the Town. The Consultant shall have no power or authority by this Contract to bind the Town in any respect. Nothing in this Contract shall be construed to be inconsistent with this relationship or status. All employees, agents, contractors or subcontractors hired or retained by the Consultant are employees, agents, contractors or subcontractors of the Consultant and not of the Town. The Town shall not be obligated in any way to pay any wage claims or other claims made against Consultant by any

such employees, agents, contractors or subcontractors, or any other person resulting from performance of this Contract.

C. The Consultant agrees it has satisfied itself by its own investigation and research regarding the conditions affecting the work to be done and labor and materials needed, and that its decision to execute this Contract is based on such independent investigation and research.

## **2. TERM OF CONTRACT**

A. The services of Consultant are to commence upon receipt of written notice to proceed from the Town, and shall be undertaken and completed in accordance with the Schedule of Performance attached hereto and incorporated herein by this reference as **Exhibit "A"**.

B. Consultant's failure to complete work in accordance with the Schedule of Performance may result in delayed compensation as described in Section 3.

## **3. COMPENSATION:**

A. The Consultant shall be compensated in accordance with the terms set forth in **Exhibit "A"**, which provides for a split of the revenues received by the Town as a direct result of work performed by Consultant under this Contract. Consultant shall not otherwise be entitled to receive any compensation from the Town and is fully responsible for its own costs and expenses incurred in connection with any and all work performed under this Contract, including if applicable sub-contractor costs.

B. To the extent Consultant is entitled to compensation in accordance with Section 3.A and **Exhibit "A"**, said compensation shall be paid within thirty (30) days following receipt of the revenues from which said compensation is to be paid.

## **4. TERMINATION:**

A. This Contract may be terminated by either party for cause, provided that the other party is given not less than thirty (30) calendar days' written notice (delivered by certified mail, return receipt requested) of intent to terminate.

B. The Town may temporarily suspend this Contract, at no additional cost to Town, provided that the Consultant is given written notice (delivered by certified mail, return receipt requested) of temporary suspension. If Town gives such notice of temporary suspension, Consultant shall immediately suspend its activities under this Contract.

C. Notwithstanding any provisions of this Contract, Consultant shall not be relieved of liability to the Town for damages sustained by the Town by virtue of any breach of this Contract by Consultant, and the Town may withhold any payments due to Consultant until such time as the exact amount of damages, if any, due the Town from Consultant is determined.

D. In the event of termination, the Consultant shall be compensated as provided for in this Contract, except as provided in Section 4C. Upon termination, the Town shall be entitled to all work, including but not limited to, appraisals, inventories, studies, analyses, drawings and data estimates performed to that date in accordance with Section 7 hereof.

**5. AMENDMENTS, CHANGES OR MODIFICATIONS:**

Amendments, changes or modifications in the terms of this Contract may be made at any time by mutual written agreement between the parties hereto and shall be signed by the persons authorized to bind the parties hereto.

**6. EXTENSIONS OF TIME:**

Consultant may, for good cause, request extensions of time to perform the services required hereunder. Such extensions shall be authorized in advance by the Town in writing and shall be incorporated in written amendments to this Contract or the attached Work Program in the manner provided in Section 5.

**7. PROPERTY OF TOWN:**

A. It is mutually agreed that all materials prepared by the Consultant under this Contract shall become the property of the Town, and the Consultant shall have no property right therein whatsoever. Immediately upon termination, the Town shall be entitled to, and the Consultant shall deliver to the Town, all data, drawings, specifications, reports, estimates, summaries and other such materials as may have been prepared or accumulated to date by the Consultant in performing this Contract which is not Consultant's privileged information, as defined by law, or Consultant's personnel information, along with all other property belonging exclusively to the Town which is in the Consultant's possession.

B. Additionally, it is agreed that the parties intend this to be a contract for services and each considers the products and results of the services to be rendered by Consultant hereunder (the "Work") to be a 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 the Town.

**8. COMPLIANCE WITH LOCAL LAW; ACCESS TO TOWN FACILITIES:**

A. Consultant shall comply with all applicable laws, ordinances, and codes of federal, State and local governments, and shall commit no trespass on any public or private property in performing any of the work authorized by this Contract. To the extent any work performed by Consultant involves the supervision or management of construction activity, Consultant will first obtain any licenses required by the State of California in order to perform such work.

B. It shall be Town's responsibility to obtain all rights of way and easements to enable Consultant to perform its services hereunder. Consultant shall assist Town in providing the same.

**9. WARRANTIES AND RESPONSIBILITIES - CONSULTANT:**

A. Consultant agrees and represents that it is qualified to properly provide the services set forth in **Exhibit "A"** in a manner which is consistent with the generally accepted standards of Consultant's profession.

B. Consultant agrees and represents that the work performed under this Contract shall be in accordance with applicable federal, State and local law in accordance with Section 17A hereof.

C. Consultant shall designate a project manager who at all times shall represent the Consultant before the Town on all matters relating to this Contract. The project manager shall continue in such capacity unless and until he or she is removed at the request of the Town, is no longer employed by Consultant, or is replaced with the written approval of the Town, which approval shall not be unreasonably withheld.

D. Consultant shall provide corrective services without charge to the Town for services which fail to meet the above professional and legal standards and which are reported to Consultant in writing within sixty (60) days of discovery. Should Consultant fail or refuse to perform promptly its obligations, the Town may render or undertake performance thereof and the Consultant shall be liable for any expenses thereby incurred.

**10. SUBCONTRACTING:**

None of the services covered by this Contract shall be subcontracted without the prior written consent of the Town, which will not be unreasonably withheld. Consultant shall be as fully responsible to the Town for the negligent acts and omissions of its contractors and subcontractors, and of persons either directly or indirectly employed by them, as it is for the negligent acts and omissions of persons directly employed by Consultant.

**11. ASSIGNABILITY:**

Consultant shall not assign or transfer any interest in this Contract whether by assignment or novation, without the prior written consent of the Town which will not be unreasonably withheld. However, claims for money due or to become due Consultant from the Town under this Contract 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 Town.

**12. INTEREST IN CONTRACT:**

Consultant covenants that neither it, nor any of its employees, agents, contractors, subcontractors has any interest, nor shall they acquire any interest, direct or indirect, in the subject of the Contract, nor any other interest which would conflict in any manner or degree with the performance of its services hereunder. Consultant shall make all disclosures required by the Town's conflict of interest code in accordance with the category designated by the Town, unless the Town Manager determines in writing that Consultant's duties are more limited in scope than is warranted by the

category designated by the Town code and that a narrower disclosure category should apply. Consultant also agrees to make disclosure in compliance with the Town conflict of interest code if, at any time after the execution of this Contract, Town determines and notifies Consultant in writing that Consultant's duties under this Contract warrant greater disclosure by Consultant than was originally contemplated. Consultant shall make disclosures in the time, place and manner set forth in the conflict of interest code and as directed by the Town.

**13. MATERIALS CONFIDENTIAL:**

All of the materials prepared or assembled by Consultant pursuant to performance of this Contract are confidential and Consultant agrees that they shall not be made available to any individual or organization without the prior written approval of the Town, except by court order.

**14. LIABILITY OF CONSULTANT-NEGLIGENCE:**

Consultant shall be responsible for performing the work under this Contract in a manner which is consistent with the generally-accepted standards of the Consultant's profession and shall be liable for its own negligence and the negligent acts of its employees, agents, contractors and subcontractors. The Town shall have no right of control over the manner in which the work is to be done but only as to its outcome, and shall not be charged with the responsibility of preventing risk to Consultant or its employees, agents, contractors or subcontractors.

**15. INDEMNITY AND LITIGATION COSTS:**

Consultant shall indemnify, defend, and hold harmless the Town, its officers, officials, agents, and 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' fees, arising in any manner by reason of negligent acts or negligent failure to act, errors, omissions or willful misconduct incident to the performance of this Contract on the part of Consultant except such loss or damage which was caused by the sole negligence, or willful misconduct of the Town. The provisions of this paragraph shall survive termination or suspension of this Contract.

**16. CONSULTANT TO PROVIDE INSURANCE:**

A. Consultant shall not commence any work before obtaining, and shall maintain in force at all times during the duration and performance of this Contract, the policies of insurance specified in this Section. Such insurance must have the approval of the Town as to limit, form, and amount, and shall be placed with insurers with a current A.M. Best's rating of no less than A VII (an NR rating is acceptable for Worker's Compensation insurance written with the State Compensation Insurance Fund of California).

B. Prior to execution of this Contract and prior to commencement of any work, the Consultant shall furnish the Town with certificates of insurance and copies of endorsements providing

evidence of coverage for all policies required by the Contract. The Consultant and its contractors and subcontractors shall, at their expense, maintain in effect at all times during the performance of work under the Contract not less than the following coverage and limits of insurance, which shall be maintained with insurers and under forms of policy satisfactory to the Town. The maintenance by Consultant and its contractors and subcontractors of the following coverage and limits of insurance is a material element of this Contract. The failure of Consultant or of any of its contractors or subcontractors to maintain or renew coverage or to provide evidence of renewal may be treated by the Town as a material breach of this Contract. Approval of the insurance by the Town shall not relieve or decrease any liability of Consultant.

1. Worker's Compensation and Employer's Liability Insurance

a. Worker's Compensation - Insurance to protect the Consultant, its contractors and subcontractors from all claims under Worker's Compensation and Employer's Liability Acts, including Longshoremen's and Harbor Worker's Act ("Acts"), if applicable. Such coverage shall be maintained, in type and amount, in strict compliance with all applicable state and Federal statutes and regulations.

b. Consultant shall provide a Waiver of Subrogation endorsement in favor of the Town, its officers, officials, employees, agents and volunteers for losses arising from work performed by the Consultant.

2. Commercial General Liability Insurance

a. The insurance shall be provided on form CG0001, or it's equivalent, and shall include coverage for claims for bodily injury or property damage arising out of premises/operations, products/completed operations, contractual liability, and subconsultant's work and personal and advertising injury resulting from actions, failures to act, or operations of the insured, or by its employees or agents, or by anyone directly or indirectly employed by the insured. The amount of insurance coverage shall not be less than **[\$1,000,000.00]** per occurrence and **[\$2,000,000]** general and products/completed operations aggregates.

b. The commercial general liability insurance shall also include the following:

i. Endorsement equivalent to CG 2010 1185 naming the Town, its officers, officials, employees, agents, and volunteers as additional insureds. The endorsement shall contain no special limitations on the scope of protection afforded to the Town, its officers, officials, employees or volunteers.



ii. Endorsement stating insurance provided to the Town shall be primary as respects the Town, its officers, officials, employees and any insurance or self insurance maintained by the Town, its officers, officials, employees or volunteers shall be in excess of the Consultant's insurance and shall not contribute with it, to the payment or satisfaction of any defense expenses, loss, or judgment.

iii. Provision or endorsement stating that the Consultant's insurance shall 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.

3. Commercial Automobile Insurance

a. The insurance shall include, but shall not be limited to, coverage for claims for bodily injury or property damage for owned, non-owned, and hired automobiles resulting from actions, failures to act, or operations of the insured, or by its employees or agents, or by anyone directly or indirectly employed by the insured. The amount of insurance coverage shall not be less than **[\$1,000,000.00]** per accident.

b. The commercial automobile insurance shall include the same endorsements required for the commercial general liability policy (see Section 16.B.2.b).

4. Professional Liability. The Consultant and its contractors and subcontractors shall secure and maintain in full force, during the term of this Contract and for five years thereafter, professional liability insurance policies appropriate to the respective professions and the work to be performed as specified in this Contract. The limits of such professional liability insurance coverage shall not be less than **[\$1,000,000]** per claim.

C. In addition to any other remedy the Town may have, if Consultant fails to maintain the insurance coverage as required in this Section, the Town may obtain such insurance coverage as is not being maintained, in form and amount substantially the same as is required herein, and the Town may deduct the cost of such insurance from any amounts due or which may become due Consultant under this Contract.

D. No policy required by this Contract shall be suspended, cancelled, terminated by either party, or reduced in coverage or in limits unless Consultant has provided thirty (30) days prior written notice by certified mail, return receipt requested, to the Town.

E. Any deductibles or self-insured retentions in excess of \$10,000 must be declared to, and approved by, the Town.

F. The requirement as to types, limits, and the Town's approval of insurance coverage to be maintained by Consultant are not intended to, and shall not in any manner, limit or qualify the liabilities and obligations assumed by Consultant under the Contract.

**17. MISCELLANEOUS PROVISIONS:**

A. Consultant shall keep itself fully informed of, shall observe and comply with, and shall cause any and all persons, firms or corporations employed by it or under its control to observe and comply with, applicable federal, state, county and municipal laws, ordinances, regulations, orders and decrees which in any manner affect those engaged or employed on the work described by this Contract or the materials used or which in any way affect the conduct of the work.

B. Consultant shall not engage in unlawful employment discrimination. Such unlawful employment discrimination includes, but is not limited to, employment discrimination based upon a person's race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, gender, citizenship, or sexual orientation.

C. Consultant shall maintain and make available for inspection by the Town and its auditors accurate records of all of its costs, disbursements and receipts with respect to any work under this Contract. Such inspections may be made during regular office hours at any time until six (6) months after the final payments under this Contract are made to the Consultant.

D. This Contract constitutes the entire agreement between the parties relative to the services specified herein and no modification hereof shall be effective unless and until such modification is evidenced by a writing signed by both parties to this Contract. There are no understandings, agreements, conditions, representations, warranties or promises, with respect to this Contract, except those contained in or referred to in the writing.

E. During the term of this agreement, the Town will not directly or indirectly engage in any business that competes with the Contractor with regards to the work described in this contract. This covenant shall apply to the entire geographical area that includes the Town.

F. All notices that are required to be given by one party to the other under this Contract shall be in writing and shall be deemed to have been given if delivered personally or enclosed in a properly addressed envelope and deposited in a United States Post Office for delivery by registered or certified mail addressed to the parties at the following addresses:

Town:

Town Manager  
Town of Loomis  
3665 Taylor Road  
Loomis, CA 95650

Consultant:

G. This Contract shall be interpreted and governed by the laws of the State of California, except that provisions of California law regarding venue shall not be applied to permit or compel venue in any court other than Placer County Superior Court or, for cases in federal court, the Northern District of California.

H. Any action arising out of this Contract shall be brought in Placer County, California, regardless of where else venue may lie.

I. In any action brought by either party to enforce the terms of this Contract, each party shall be bear responsibility for its attorney's fees and all costs regardless of whether one party is determined to be the prevailing party.

TOWN OF LOOMIS

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

Title:

ATTEST:

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

Town Clerk

APPROVED AS TO FORM:

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

Town Attorney

CONSULTANT

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

Title:

## EXHIBIT "A"

### SCOPE OF SERVICES

I. Services. Consultant will provide the following services to the Town of Loomis during the Term of this Contract:

A. Conduct an inventory of the Town Structures, as identified herein. This shall include defining their latitude, longitude, and elevations within 90 days of the execution of this contract.

B. Determine which of the Town Structure can support attachments for Micro-towers and/or DAS systems to be used by the carriers for the development of the 4G model within 90 days of the execution of this contract. As used in this Contract, the term "DAS" refers to a Distributed Antenna System and the term "Micro-tower" refers to an antenna system that is much smaller than traditional systems and is not required to be mounted on a tower.

C. Locate all known fiber routes both underground and aerial within 90 days of the execution of this contract. Along with the route define if the fibers are lit and dark and where the termination facility is located. The development of this overlay will establish the best method and location of both the Micro-towers and/or DAS.

D. Once Town Structures and existing facilities are determined Consultant shall actively market Town Structures to wireless carriers, broadband access carriers, and fixed wireless carriers ("Wireless Service Providers"). It will take an aggressive and creative campaign program to persuade carriers to choose Town Structures over that of the private sector.

E. Once the Wireless Service Provider has expressed interest in a given area Consultant will provide the Town and the carrier with a detailed engineering plan for the deployment of a 4G deployment.

F. Upon the Wireless Service Provider's review Consultant will refine the design for final evaluation .

G. Consultant will then engage the appropriate Town officials/and engineers to review the design and plans for final approval of deployment, and prepare for review and approval by staff and the Town Attorney, and presentation to Town Council, all necessary agreement(s) between the carrier and the Town.

H. Consultant will then supervise the installation to ensure that it is done according to specifications and design as approved by the Town..

I. Once all installations are complete Consultant will then inspect and certify installations have been done according to standards and code.

J. Consultant will then provide the Town with detailed records and asset listings of all wireless assets.

K. Consultant will assist the Town as necessary in establishing the appropriate billing and collections for the aforementioned assets sites.

L. Consultant will conduct quarterly reviews of all sites and continue to market to other carriers for additional revenue opportunities.

II. Term. The Term of this Contract shall commence on the date Town delivers a Notice to Proceed and continue in effect, unless terminated earlier in accordance with this Contract, for a period of three (3) years.

III. Territory. The territory covered by this Contract includes the boundaries of the Town of Loomis.

IV. Duties of CMA. CMA will use its best efforts to: i) market Town Structures appropriate for the installation of DAS, Micro-tower, and other wireless facilities; ii) prepare and present leases with Wireless Service Providers to the Town for approval; and iii) manage as agent for the Town the development, installation and maintenance of wireless sites and infrastructure on Town Structures.

V. Compensation for CMA. Consultant will receive 40% and Town will receive 60% of revenue actually received by the Town from agreements between the Town and Wireless Service Providers that locate their wireless facilities on Town Structures, but only if the decision to locate on the Town Structure was a direct result of the work performed by Consultant pursuant to this Contract. CMA shall only be entitled to compensation from Wireless Service Providers that are not the Consultant or any entity that is owned by and/or controlled by Consultant. Consultant shall only receive compensation during the period in which this contract is in full force and effect.

EXHIBIT "B"

CERTIFICATE OF COMPLIANCE WITH LABOR CODE § 3700

[Labor Code § 1861]

I am aware of the provisions of Section 3700 of the Labor Code which require every employer to be insured against liability for workers' compensation or to undertake self-insurance in accordance with the provisions of that code, and I will comply with such provisions before commencing the performance of the work of this contract.

CONSULTANTS

By:

[Title]



