



**SAN RAFAEL CITY COUNCIL AGENDA REPORT**

Department: Public Works

Prepared by: Bill Guerin,  
Director of Public Works

City Manager Approval: 

**TOPIC: THIRD STREET SAFETY IMPROVEMENTS PROJECT**

**SUBJECT: ADOPT RESOLUTIONS RELATED TO THE THIRD STREET SAFETY IMPROVEMENTS PROJECT HSIPL 5043(043), CITY PROJECT NO. 11362**

- 1. ADOPT A RESOLUTION AWARDED AND AUTHORIZING THE CITY MANAGER TO EXECUTE THE CONSTRUCTION AGREEMENT FOR THE THIRD STREET SAFETY IMPROVEMENTS PROJECT, HSIPL 5043(043) TO GHILOTTI BROS., INC., IN THE AMOUNT OF \$2,236,926, AND AUTHORIZING CONTINGENCY FUNDS IN THE AMOUNT OF \$263,074, FOR A TOTAL APPROPRIATED AMOUNT OF \$2,500,000.**
- 2. ADOPT A RESOLUTION APPROVING AND AUTHORIZING THE CITY MANAGER TO EXECUTE A PROFESSIONAL SERVICES AGREEMENT WITH PARK ENGINEERING, INC. FOR CONSTRUCTION MANAGEMENT, MATERIALS TESTING, AND INSPECTION SERVICES ASSOCIATED WITH THE THIRD STREET SAFETY IMPROVEMENTS PROJECT, HSIPL 5043(043), IN THE AMOUNT OF \$258,499, IN A FORM APPROVED BY THE CITY ATTORNEY.**
- 3. ADOPT A RESOLUTION APPROVING AND AUTHORIZING THE CITY MANAGER TO EXECUTE AN AMENDMENT TO THE PROFESSIONAL SERVICES AGREEMENT WITH KIMLEY-HORN AND ASSOCIATES, INC. FOR CONSTRUCTION SUPPORT SERVICES ASSOCIATED WITH THE THIRD STREET SAFETY IMPROVEMENTS PROJECT, HSIPL 5043(043), IN THE AMOUNT OF \$40,000 FOR A NEW TOTAL PROFESSIONAL SERVICES AGREEMENT OF \$320,000, IN A FORM APPROVED BY THE CITY ATTORNEY.**

**RECOMMENDATION:** Staff recommends that the City Council:

1. Adopt a resolution awarding and authorizing the City Manager to execute the Construction Agreement for the Third Street Safety Improvements Project, HSIPL 5043(043) to Ghilotti Bros., Inc. in the Amount of \$2,236,926 and authorizing contingency funds in the amount of \$263,074 for a total appropriated amount of \$2,500,000.
2. Adopt a resolution approving and authorizing the City Manager to execute a professional services agreement with Park Engineering for construction management, materials

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**FOR CITY CLERK ONLY**

**Council Meeting:**

**Disposition:**

testing, and inspection services with the Third Street Safety Improvements Project, HSIPL 5043(043), in the amount of \$258,499.

3. Adopt a resolution approving and authorizing the City Manager to execute an amendment to the professional services agreement with Kimley Horn for construction support services associated with the Third Street Safety Improvements Project, HSIPL 5043(043), in the amount of \$40,000 for a new total professional services agreement of \$320,000.

**BACKGROUND:**

In 2004, the Transportation Authority of Marin (TAM) established a Measure A Expenditure Plan (Plan) for a voter-approved sales tax providing funds for major roadway projects in Marin County. Plan projects were prioritized based on roadway condition, traffic volumes, transit frequency, and existing bicycle and pedestrian access. In 2016, San Rafael received a commitment from TAM for \$11 million from Measure A and an additional \$1.5 million from the State Local Partnership Program for the purpose of making significant infrastructure improvements along Third Street.

In 2018, the City applied for federal funding through the Highway Safety Improvement Program (HSIP) administered by Caltrans. Upon favorable review, the City was awarded \$1,575,000 in funding for Third Street between Lindaro Street and Union Street. As project delivery utilizing federal funds can be complex and impact timelines, staff subdivided the entire Third Street corridor into the following two projects:

1. Third Street Rehabilitation Project – Miracle Mile to Lindaro Street; and
2. Third Street Safety Improvements Project – Lindaro Street to Union Street.

The City Council approved the design and environmental work for the Third Street Rehabilitation Project at their November 18, 2019 meeting.

The Third Street Safety Improvements project consists of roadway and pedestrian improvements, including but not limited to, street resurfacing, curb ramps, sidewalk, storm drain, and traffic signal upgrades. Project intersections on Third Street include Lindaro Street, Lincoln Avenue, Tamalpais Avenue, Irwin Street, and Grand Avenue. These intersections constitute one of the most heavily congested areas in both San Rafael and Marin County. This is due in part to their proximity to major traffic generators, such as the northbound and southbound on/off-ramps for US 101, San Rafael Transit Center, SMART station, Caltrans Park-and-Ride lots, Downtown San Rafael, Montecito Shopping Center, and San Rafael High School.

City staff developed conceptual design drawings for the proposed safety improvements and subsequently, on May 24, 2019, issued a request for proposals (RFP). The conceptual design provided a basic framework to potential consultants of the City's objectives for this project, and the plans were also utilized to solicit feedback from the City's Bicycle and Pedestrian Advisory Committee at their August 7, 2019 meeting. Staff intends to combine the HSIP Grant funding of \$1,575,000 with Traffic Mitigation and Gas Tax funding to construct the traffic safety improvements and other roadway upgrades between Lindaro and Union Streets.

On March 2, 2020 the City Council Awarded a Professional Services Agreement to Kimley Horn for the design and environmental clearance services associated with the Third Street Safety Improvements project.

On February 7, 2022 the City council awarded the construction of the Third Street Rehabilitation Project to Ghilotti Bros. The Third Street Rehabilitation Project is currently under construction and overlaps the limits of the Third Street Safety Improvements Project. City staff intend to have

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both projects work concurrently and coordination between the two projects will be needed to provide the best finished product. On January 14, 2022 City solicited Construction Management, Materials Testing, and Inspection Services.

On March 4, 2022 the project was advertised in accordance with San Rafael's Municipal Code.

**ANALYSIS:** On March 30, 2022, the following bids were received and read aloud:

<b><u>NAME OF BIDDER</u></b>	<b><u>BASE BID</u></b>	<b><u>Notes</u></b>
CF Contracting, Inc.	\$2,079,538.00	Nonresponsive, Material Errors in Proposal
Ghilotti Bros., Inc.	\$2,236,926.00	
Ghilotti Construction Company, Inc.	\$2,674,650.90	
St. Francis Electric, LLC.	\$2,687,000.00	
Michael Paul Company, Inc.	\$3,010,778.00	

The construction bids have been reviewed by City staff. The low bid from CF Contracting, Inc. has been found to be nonresponsive.

The second low bid from Ghilotti Bros., Inc. in the amount of \$2,236,926 was found to be both responsive and responsible. City staff recommends awarding the construction contract to Ghilotti Bros., Inc. for the bid amount and recommends the City Council authorize a construction contingency of approximately twelve percent in an amount of \$263,074 for a total authorized amount of \$2,500,000.

**Resolution (Agreement with Park Engineering for Construction Management, Materials Testing, and Inspection Services)**

To ensure the best finished product, this project will require full-time inspection. Public Works proposes to retain a field inspector for this purpose. As such, Public Works solicited Statements of Qualifications, including billing rate schedules. Four proposals were received on February 3, 2022. The Proposal was evaluated by City staff based on criteria specified in the Request for Qualifications including, but not limited to, understanding of the work to be done, previous experience with similar projects, qualified personnel, and familiarity with City standards. Staff has reviewed the proposal and has found it to be complete and within industry standards.

The recommended Resolution authorizes the City Manager to execute a professional services agreement with Park Engineering for the required construction management, materials testing, and inspection services, in an amount not to exceed \$258,499.

**Resolution (Amendment to Agreement with Kimley-Horn and Associates, Inc. for Construction Support Services)**

To ensure the best finished product, this project will require construction support services by the designer. Public Works proposes to retain Kimley-Horn and Associates, Inc. for this purpose. As such, Public Works solicited a proposal for the necessary construction support services. The Proposal was evaluated by City staff based on criteria specified in the Request for Qualifications including, but not limited to, understanding of the work to be done, previous experience with similar projects, qualified personnel, and familiarity with City standards. Staff has reviewed the proposal and has found it to be complete and within industry standards.

The original contract with Kimley-Horn and Associates in the amount of \$28,000 was for environmental and design services. The recommended Resolution authorizes the City Manager

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to execute an amendment to the professional services agreement with Kimley-Horn and Associates, Inc. for the required construction support services, in an amount \$40,000 for a new total professional services agreement of \$320,000.

Table 1 summarizes the project construction expenses.

**Table 1: Construction Expense Summary**

<b>Project Element</b>	<b>Expense Amount</b>
Construction contract w/ contingency	\$2,500,000
Construction Management & Inspection	\$258,499
PSA Amendment	\$40,000
<b>Total</b>	<b>\$2,798,499</b>

**PUBLIC OUTREACH:** Public Works has engaged the community and key stakeholders over the last four years to receive feedback as summarized below:

- July 2017: Technical Working Group Meeting
- October 2017: Community Working Group Meeting
- November 2017: Community Meeting #1 - Feasibility Study
- February 2018: Community and Technical Working Group Meeting
- March 2018: Community Meeting #2 - Feasibility Study
- June 3, 2019: Feasibility Study Report Presentation at City Council
- July 15, 2020: Technical Working Group Meeting
- August 5, 2020: City's Bicycle and Pedestrian Advisory Committee (BPAC)
- August 23, 2020: Community Working Group Meeting
- September 23, 2020: Community Meeting #3
- October 8, 2020: Economic Development Subcommittee Meeting
- October 21, 2020: Association of Neighborhoods Meeting
- November 2, 2020: City Council Informational Report
- December 2, 2020: City's Bicycle and Pedestrian Advisory Committee (BPAC)
- February 3, 2021: City's Bicycle and Pedestrian Advisory Committee (BPAC)
- March 24, 2021: Community Meeting #4
- May 3, 2021: City Council Presentation
- May 10, 2021: Presentation to TAM Executive Committee

In addition to these meetings, Public Works has maintained an updated project website and met with residents and business owners virtually and onsite to discuss key issues.

**FISCAL IMPACT:** Staff proposes to fund construction of this project utilizing \$1,295,000 in federal Highway Safety Improvement Program grant funds supplemented by \$523,000 of Traffic Mitigation Fund (No. 246) and \$980,499 of Gas Tax Funds (No. 206). The proposed Resolutions would appropriate \$2,500,000 for construction/contingency and \$258,499 for inspection services and \$40,000 for the amendment to Kimley-Horn and Associates, Inc. professional services agreement for construction support services. Table 2 below summarizes the project's construction funding sources and staff recommended appropriations for this project.

**Table 2: Construction Funding Summary**

<b>Project Element</b>	<b>Expense Amount</b>
Gas Tax Fund #206	\$980,499
Traffic Mitigation Fund #246	\$523,000
HSIP	\$1,295,000
<b>Total</b>	<b>\$2,798,499</b>

**OPTIONS:**

1. Adopt resolutions as presented.
2. Council may choose to authorize the construction contract and construct support services, and instruct staff to perform the inspections, which may impact the delivery of other City projects.
3. Council may reject all bids and direct staff to rebid both the inspection and construction for this project. If this option is chosen, soliciting new proposals or rebidding the project will delay construction and postpone the project until the spring of 2023 and inhibit the Third Street Rehabilitation Project from finishing work including the repaving of Third Street within the Third Street Safety Improvements Projects boundary.
4. The Council may reject all bids and direct staff to stop work on the project.
5. Do not adopt the resolutions and provide further direction to staff.

**RECOMMENDED ACTION:** Staff recommends that the City Council:

1. Adopt a resolution awarding and authorizing the City Manager to execute the construction agreement for the Third Street Safety Improvements Project, HSIPL 5043(043) to Ghilotti Bros., Inc., in the amount of \$2,236,926 and authorizing contingency funds in the amount of \$263,074 for a total appropriated amount of \$2,500,000.
2. Adopt a resolution approving and authorizing the City Manager to execute a professional services agreement with Park Engineering for construction management, materials testing, and inspection services associated with the Third Street Safety Improvements Project, HSIPL 5043(043), in the amount of \$258,499, in a form approved by the City Attorney.
3. Adopt a resolution approving and authorizing the City Manager to execute an amendment to the professional services agreement with Kimley-Horn and Associates, Inc. for construction support services associated with the Third Street Safety Improvements Project, HSIPL 5043(043), in the amount of \$40,000 for a new total professional services agreement of \$320,000.

**ATTACHMENT:**

1. Resolution awarding the construction agreement Ghilotti Bros., Inc.
2. Resolution authorizing the City Manager to execute a professional services agreement with Park Engineering, Inc. for construction management, materials testing, and inspection services
3. Resolution authorizing the City Manager to execute an amendment to the professional services agreement with Kimley-Horn and Associates, Inc. for construction support services
4. Agreements
  - a) Park Engineering
  - b) Kimley-Horn and Associates, Inc.

**RESOLUTION NO.**

**RESOLUTION OF THE SAN RAFAEL CITY COUNCIL AWARDING AND AUTHORIZING THE CITY MANAGER TO EXECUTE THE CONSTRUCTION AGREEMENT FOR THE THIRD STREET SAFETY IMPROVEMENTS PROJECT, HSIPL 5043(043) TO GHILOTTI BROS. INC., IN THE AMOUNT OF \$2,236,926.00, AND AUTHORIZING CONTINGENCY FUNDS IN THE AMOUNT OF \$263,074.00 FOR A TOTAL APPROPRIATED AMOUNT OF \$2,500,000.**

**WHEREAS**, the City desires to implement safety improvements along the Third Street corridor from Lindaro Street to Grand Avenue; and

**WHEREAS**, on the 29<sup>th</sup> day of March 2022, pursuant to due and legal notice published in the manner provided by law, inviting sealed bids or proposals for the work hereinafter mentioned, as more fully appears from the Affidavit of Publication thereof on file in the office of the City Clerk of the City of San Rafael, California, the City Clerk of said City did publicly open, examine, and declare all sealed bids or proposals for doing the following work in said City, to wit:

**“Third Street Safety Improvements Project”**

**HSIPL 5043 (043) City Project No. 11362**

in accordance with the plans and specifications therefore on file in the office of the Department of Public Works; and

**WHEREAS**, the bid of \$2,236,926.00 from Ghilotti Bros. Inc., at the unit prices stated in its bid, was and is the lowest bid for said work and said bidder is the lowest responsible bidder; and

**WHEREAS**, staff has recommended an additional 12% of the bid price for a contingency in the amount of \$263,074.00;

**NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF SAN RAFAEL RESOLVES** as follows:

1. The plans and specifications for the “Third Street Safety Improvements Project”, City Project No. 11362 on file in the Department of Public Works, are hereby approved.
2. The bid of Ghilotti Bros., Inc. is hereby accepted at the unit prices stated in its bid, and the contract for said work and improvements is hereby awarded to Ghilotti Bros., Inc., at the stated unit prices.

3. The City Manager is authorized and directed to execute a contract with Ghilotti Bros. Inc., for the bid amount, subject to final approval as to form by the City Attorney, and to return the bidder's bond upon the execution of the contract.
4. Funds totaling \$2,500,000.00, which includes the construction award amount and contingency, will be appropriated for City Project No. 11362, as follows: \$1,295,000 in federal Highway Safety Improvement Program grant funds supplemented by \$523,000 of Traffic Mitigation Fund #246 and \$582,000 of Gas Tax Funds (No. 206).
5. The Director of Public Works is hereby authorized to take any and all such actions and make changes as may be necessary to accomplish the purpose of this resolution.

I, **Lindsay Lara**, Clerk of the City of San Rafael, hereby certify that the foregoing Resolution was duly and regularly introduced and adopted at a regular meeting of the City Council of said City held on Monday, the 18<sup>th</sup> of April 2022 by the following vote, to wit:

AYES: COUNCILMEMBERS:  
NOES: COUNCILMEMBERS:  
ABSENT: COUNCILMEMBERS:

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**LINDSAY LARA, City Clerk**

File No.: 18.01.87

**RESOLUTION NO.**

**A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF SAN RAFAEL APPROVING AND AUTHORIZING THE CITY MANAGER TO EXECUTE A PROFESSIONAL SERVICES AGREEMENT WITH PARK ENGINEERING, INC. FOR CONSTRUCTION MANAGEMENT, MATERIALS TESTING, AND INSPECTION SERVICES ASSOCIATED WITH THE THIRD STREET SAFETY IMPROVEMENTS PROJECT, HSIPL 5043(043), IN THE AMOUNT OF \$258,499.**

**WHEREAS**, the City has advertised and received contractor bids for Third Street Safety Improvements Project, HSIPL 5043(043), City Project 11362; and

**WHEREAS**, the City requires outside professional assistance to provide the construction management, materials testing, and inspection services for the aforementioned project; and

**WHEREAS**, staff received a proposal for the required construction inspection services dated February 3, 2022 from Park Engineering, Inc.; and

**WHEREAS**, staff has reviewed the proposal and found it to be complete and within industry standards; and

**NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF SAN RAFAEL RESOLVES** as follows:

1. The Council hereby approves and authorizes the City Manager to execute a Professional Services Agreement with Park Engineering, Inc., as set forth in the accompanying staff report, for construction management, materials testing, and inspection services for the Third Street Safety Improvements Project, HSIPL 5043(043), in the amount of \$258,499, in the form included with the staff report supporting this resolution, subject to final approval as to form by the City Attorney
2. Funds totaling \$258,499 shall be appropriated from the Gas Tax Fund (#206) to the Third Street Safety Improvements Project, HSIPL 5043(043) (Project No. 11362) to accommodate this amendment to the agreement.



3. The Director of Public Works is hereby authorized to take any and all such actions and make changes as may be necessary to accomplish the purpose of this resolution.

I, **LINDSAY LARA**, Clerk of the City of San Rafael, hereby certify that the foregoing Resolution was duly and regularly introduced and adopted at a regular meeting of the City Council of said City on Monday, the 18<sup>th</sup> day of April 2022, by the following vote, to wit:

AYES: COUNCILMEMBERS:

NOES: COUNCILMEMBERS:

ABSENT: COUNCILMEMBERS:

LINDSAY LARA, City Clerk

File No.: 18.01.87

**RESOLUTION NO.**

**RESOLUTION OF THE CITY COUNCIL OF THE CITY OF SAN RAFAEL  
APPROVING AND AUTHORIZING THE CITY MANAGER TO EXECUTE A FIRST  
AMENDMENT TO THE AGREEMENT WITH KIMLEY-HORN AND ASSOCIATES,  
INC. FOR ADDITIONAL CONSTRUCTION SUPPORT SERVICES, IN AN  
ADDITIONAL CONTRACT AMOUNT NOT TO EXCEED \$40,000**

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**WHEREAS**, pursuant to City Council Resolution No. 14767, the City of San Rafael and Kimley Horn entered into a Professional Services Agreement dated March 3, 2020 for engineering design and environmental clearance services associated with the Third Street Safety Improvements Project, HSIPL 5043 (043) in the amount not to exceed \$280,000 (the "Agreement"); and

**WHEREAS**, the City requires additional construction support services from Kimley-Horn and Associates, Inc. to cover the engineering and design construction support needed during the construction phase of the project; and

**WHEREAS**, staff received a proposal from Kimley-Horn and Associates, Inc. for the additional required services in a total amount not to exceed \$40,000; and

**WHEREAS**, staff has reviewed their proposal and found it to be complete and within industry standards; and

**WHEREAS**, \$40,000 will be appropriated from the Gas Tax Fund (#206);

**NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF SAN RAFAEL**

**RESOLVES** as follows:

1. The Council hereby approves and authorizes the City Manager to execute a First Amendment to the Professional Services Agreement with Kimley-Horn and Associates, Inc. for additional construction support services in connection with the associated with the Third Street Safety Improvements Project, HSIPL 5043 (043) in the amount of \$40,000 and a revised total contract value not to exceed \$320,000, in the form included with the staff report supporting this resolution, subject to final approval as to form by the City Attorney.

2. The Director of Public Works is hereby authorized to take any and all such actions and make changes as may be necessary to accomplish the purpose of this resolution.

I, **LINDSAY LARA**, Clerk of the City of San Rafael, hereby certify that the foregoing resolution was duly and regularly introduced and adopted at a regular meeting of the Council of said City on Monday, the 18<sup>th</sup> day of April 2022 by the following vote, to wit:

AYES:      COUNCILMEMBERS:

NOES:      COUNCILMEMBERS:

ABSENT: COUNCILMEMBERS:

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**LINDSAY LARA, City Clerk**

**AGREEMENT FOR PROFESSIONAL SERVICES WITH PARK ENGINEERING, INC.  
FOR CONSTRUCTION MANAGEMENT & MATERIAL TESTING SERVICES  
FOR THE THIRD STREET SAFETY IMPROVEMENTS PROJECT**

**ARTICLE I INTRODUCTION**

- A. This AGREEMENT is entered into as of the \_\_\_\_\_ day of \_\_\_\_\_, 2022 by and between the following named, hereinafter referred to as CONSULTANT, and the following named, hereinafter referred to as LOCAL AGENCY:

The name of the "CONSULTANT" is as follows: Park Engineering, Inc., incorporated in or authorized to do business in the State of California.

The Project Manager for the "CONSULTANT" will be Steve Patterson

The name of the "LOCAL AGENCY" is as follows: City of San Rafael

The Contract Administrator for LOCAL AGENCY will be Bill Guerin, Public Works Director

- B. The work to be performed under this AGREEMENT is described in Article III Statement of Work and the approved CONSULTANT's Cost Proposal ("Cost Proposal") dated March 7, 2022. The approved CONSULTANT's Cost Proposal is included in Exhibit A 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, 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 attorney's 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 CONSULTANT will not reimburse LOCAL AGENCY for any 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 LOCAL AGENCY.
- E. LOCAL AGENCY is not required to make 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 of 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 LOCAL AGENCY 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 LOCAL AGENCY 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 submit progress reports at least once a month. The report 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 Project Manager shall meet with LOCAL AGENCY's Contract Administrator, as needed, to discuss progress on the AGREEMENT.

## **ARTICLE III STATEMENT OF WORK**

The CONSULTANT shall perform the services specified in the Scope of Work, dated March 7, 2022, attached hereto as Exhibit A and incorporated herein by reference. If there is any conflict between the terms of the Cost Proposal, included in Exhibit A, and the terms of this AGREEMENT, the terms of this AGREEMENT shall take precedence.

## **ARTICLE IV PERFORMANCE PERIOD**

- A. This AGREEMENT shall go into effect on the date first hereinabove written, 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 upon completion of the work to the satisfaction of the LOCAL AGENCY'S Contract Administrator.
- B. CONSULTANT is advised that any recommendation for AGREEMENT award is not binding on LOCAL AGENCY until the AGREEMENT is fully executed and approved by LOCAL AGENCY.

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

- A. CONSULTANT will be reimbursed for hours worked at the hourly rates specified in the CONSULTANT's approved Cost Proposal. The specified hourly rates shall include direct salary costs, employee benefits, prevailing wages, employer payments, overhead, and fee. These rates are not adjustable for the performance period set forth in this AGREEMENT. CONSULTANT will

be reimbursed within thirty (30) days upon receipt by LOCAL AGENCY'S Contract Administrator of itemized invoices in duplicate.

- B. In addition, CONSULTANT will be reimbursed for incurred (actual) direct costs other than salary costs that are in the approved Cost Proposal and identified in the approved Cost Proposal.
- C. Reserved.
- D. Reserved.
- E. Reserved.
- F. Reimbursement for transportation and subsistence costs shall not exceed the rates as specified in the approved Cost Proposal. CONSULTANT will be responsible for transportation and subsistence costs in excess of State rates.
- G. When milestone cost estimates are included in the approved Cost Proposal, CONSULTANT shall obtain prior written approval in the form of an AGREEMENT amendment for a revised milestone cost estimate from the Contract Administrator before exceeding such estimate.
- H. Progress payments will be made monthly in arrears based on services provided and actual costs incurred.
- I. 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 or for any work performed prior to approval of this AGREEMENT.
- J. Reserved.
- K. 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 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. Credits due LOCAL AGENCY that include any equipment purchased under the provisions of Article XI Equipment Purchase, must be reimbursed by CONSULTANT prior to the expiration or termination of this AGREEMENT. Invoices shall be mailed to LOCAL AGENCY's Contract Administrator at the following address:

City of San Rafael Department of Public Works  
Bill Guerin  
111 Morphew Street  
San Rafael, CA 94901

- L. Reserved.
- M. The total amount payable by LOCAL AGENCY shall not exceed the amount agreed to in this AGREEMENT, unless authorized by amendment.
- N. Reserved.

O. Reserved.

P. The total amount payable by LOCAL AGENCY for all work resulting from this AGREEMENT shall not exceed \$ 258,498.65. It is understood and agreed that there is no guarantee, either expressed or implied that this dollar amount will be authorized under this AGREEMENT.

#### **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, and in accordance with Article XXVI, Ownership of Data.
- 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 provided for in subsection A of this section.
- C. Notwithstanding any provisions of this AGREEMENT, CONSULTANT shall not be relieved of liability to LOCAL AGENCY for damages sustained by LOCAL AGENCY by virtue of any breach of this AGREEMENT by CONSULTANT, and LOCAL AGENCY may withhold any payments due to CONSULTANT until such time as the exact amount of damages, if any, due LOCAL AGENCY from CONSULTANT is determined.
- D. In the event of termination, CONSULTANT shall be compensated as provided for in this AGREEMENT, except as provided in Article XI, section C. 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, and in accordance with Article XXVI, Ownership of Data.

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

- A. The CONSULTANT agrees that 48 CFR Part 31, Contract Cost Principles and Procedures, shall be used to determine the allowability of individual items of cost.
- B. The CONSULTANT also agrees to comply with Federal procedures in accordance with 2 CFR Part 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 Part 31 or 2 CFR Part 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 Part 200, Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards shall apply.

#### **ARTICLE VIII RETENTION OF RECORDS/AUDIT**

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. 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 Finance Director.
- B. Not later than thirty (30) days after issuance of the final audit report, CONSULTANT may request a review by LOCAL AGENCY'S Finance Director 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, Part 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 Caltrans Audits and Investigation (A&I). Caltrans A&I, 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 Caltrans A&I's review of the ICR audit work papers created by the CONSULTANT's independent CPA, Caltrans A&I 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 Caltrans A&I 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; GAAS (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 A&I.

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 Caltrans A&I is unable to issue a cognizant letter per paragraph E.1. above, Caltrans A&I 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. Caltrans A&I 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 Caltrans A&I 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) Caltrans A&I 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) Caltrans A&I 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.

## **ARTICLE X SUBCONTRACTING**

- A. Nothing contained in this AGREEMENT or otherwise, shall create any contractual relation between LOCAL AGENCY and any Subconsultants, and no sub-agreement shall relieve the CONSULTANT of its responsibilities and obligations hereunder. The CONSULTANT agrees to be as fully responsible to 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 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 sub-agreement 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 LOCAL AGENCY Contract Administrator in advance of assigning work to a substitute 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 bidding must be adequately justified.
- C. Any equipment purchased as a result of this contract 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 Part 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  
[http://www.dot.ca.gov/hq/construc/LaborCompliance/documents/District-Region\\_Map\\_Construction\\_7-8-15.pdf](http://www.dot.ca.gov/hq/construc/LaborCompliance/documents/District-Region_Map_Construction_7-8-15.pdf).

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 Internet site 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 Subconsultant'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 sub-agreement 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 (Verbatim)**

- 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 the 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. 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 sub-agreements, which exceed one hundred thousand dollars (\$100,000) and that all such subrecipients shall certify and disclose accordingly.

## ARTICLE XVI NON-DISCRIMINATION 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 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 Part 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.

## ARTICLE XVII DEBARMENT AND SUSPENSION CERTIFICATION

- A. 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 to whom exceptions apply, the initiating agency, and the dates of agency action.
- C. Exceptions to the Federal Government Excluded Parties List System maintained by the U.S. General Services Administration are to be determined by FHWA.

## ARTICLE XVIII DISADVANTAGED BUSINESS ENTERPRISES (DBE) PARTICIPATION

- A. This AGREEMENT is subject to 49 CFR Part 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 **6.0%**. Participation by DBE CONSULTANT or subconsultants shall be in accordance with information contained in [Exhibit 10-01: Consultant Proposal DBE Commitment](#), or in [Exhibit 10-02: 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 Part 26 for guidance regarding evaluation of good faith efforts to meet the DBE goal.
- D. DBEs and other small businesses, as defined in 49 CFR Part 26 are encouraged to participate in the performance of AGREEMENTs financed in whole or in part with federal funds. The LOCAL AGENCY, CONSULTANT or subconsultant shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The CONSULTANT shall carry out applicable requirements of 49 CFR part 26 in the award and administration of DOT-assisted contracts. Failure by the CONSULTANT to carry out these requirements is a material breach of this AGREEMENT, which may result in the termination of this AGREEMENT or such other remedy as the LOCAL AGENCY 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 the contractor from future bidding as non-responsible
- E. A DBE firm may be terminated only with prior written approval from LOCAL AGENCY and only for the reasons specified in 49 CFR §26.53(f). Prior to requesting LOCAL AGENCY consent for the termination, CONSULTANT must meet the procedural requirements specified in 49 CFR §26.53(f). 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.
- F. Consultant shall not be entitled to any payment for such work or material unless it is performed or supplied by the listed DBE or by other forces (including those of Consultant) pursuant to prior written authorization of the LOCAL AGENCY's Contract Administrator.
- 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 Commercially Useful Function (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 prime CONSULTANT's shall also show the date of work performed by their own forces along with the corresponding dollar value of the work.
- K. Upon completion of the AGREEMENT, a summary of these records shall be prepared and submitted on the form entitled, [Exhibit 17-F: Final Report-Utilization of Disadvantaged Business Enterprise \(DBE\) First-Tier Subconsultants](#), certified correct by CONSULTANT or CONSULTANT's authorized representative and shall be furnished to the Contract Administrator with the final invoice. Failure to provide the summary of DBE payments with the final invoice will result in twenty-five percent (25%) of the dollar value of the invoice being withheld from payment until the form is submitted. The amount will be returned to CONSULTANT when a satisfactory "Final Report-Utilization of Disadvantaged Business Enterprises (DBE), First-Tier Subconsultants" is submitted to the Contract Administrator.
- L. 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.

- M. Any subcontract entered into as a result of this AGREEMENT shall contain all of the provisions of this section.

## **ARTICLE XIX INSURANCE**

- A. **Scope of Coverage.** During the term of this Agreement, CONSULTANT shall maintain, at no expense to LOCAL AGENCY, the following insurance policies:

1. A commercial general liability insurance policy in the minimum amount of one million dollars (\$1,000,000) per occurrence/two million dollars (\$2,000,000) aggregate, for death, bodily injury, personal injury, or property damage.
2. An automobile liability (owned, non-owned, and hired vehicles) insurance policy in the minimum amount of one million dollars (\$1,000,000) dollars per occurrence.
3. If any licensed professional performs any of the services required to be performed under this Agreement, a professional liability insurance policy in the minimum amount of one million dollars (\$1,000,000) per occurrence/two million dollars (\$2,000,000) aggregate, to cover any claims arising out of the CONSULTANT 's performance of services under this Agreement. Where CONSULTANT is a professional not required to have a professional license, LOCAL AGENCY reserves the right to require CONSULTANT to provide professional liability insurance pursuant to this section.
4. If it employs any person, CONSULTANT shall maintain worker's compensation insurance, as required by the State of California, with statutory limits, and employer's liability insurance with limits of no less than one million dollars (\$1,000,000) per accident for bodily injury or disease. CONSULTANT's worker's compensation insurance shall be specifically endorsed to waive any right of subrogation against LOCAL AGENCY.

- B. **Other Insurance Requirements.** The insurance coverage required of the CONSULTANT in subparagraph A of this section above shall also meet the following requirements:

1. Except for professional liability insurance or worker's compensation insurance, the insurance policies shall be specifically endorsed to include the LOCAL AGENCY, its officers, agents, employees, and volunteers, as additional insureds (for both ongoing and completed operations) under the policies.
2. The additional insured coverage under CONSULTANT'S insurance policies shall be "primary and noncontributory" with respect to any insurance or coverage maintained by LOCAL AGENCY and shall not call upon LOCAL AGENCY's insurance or self-insurance coverage for any contribution. The "primary and noncontributory" coverage in CONSULTANT'S policies shall be at least as broad as ISO form CG20 01 04 13.
3. Except for professional liability insurance or worker's compensation insurance, the insurance policies shall include, in their text or by endorsement, coverage for contractual liability and personal injury.
4. By execution of this Agreement, CONSULTANT hereby grants to LOCAL AGENCY a waiver of any right to subrogation which any insurer of CONSULTANT may acquire against LOCAL AGENCY by virtue of the payment of any loss under such insurance. CONSULTANT agrees to obtain any endorsement that may be necessary to affect this waiver of subrogation, but this provision applies regardless of whether or not LOCAL AGENCY has received a waiver of subrogation endorsement from the insurer.
5. If the insurance is written on a Claims Made Form, then, following termination of this Agreement, said insurance coverage shall survive for a period of not less than five years.

6. The insurance policies shall provide for a retroactive date of placement coinciding with the effective date of this Agreement.
  7. The limits of insurance required in this Agreement may be satisfied by a combination of primary and umbrella or excess insurance. Any umbrella or excess insurance shall contain or be endorsed to contain a provision that such coverage shall also apply on a primary and noncontributory basis for the benefit of LOCAL AGENCY (if agreed to in a written contract or agreement) before LOCAL AGENCY'S own insurance or self-insurance shall be called upon to protect it as a named insured.
  8. It shall be a requirement under this Agreement that any available insurance proceeds broader than or in excess of the specified minimum insurance coverage requirements and/or limits shall be available to LOCAL AGENCY or any other additional insured party. Furthermore, the requirements for coverage and limits shall be: (1) the minimum coverage and limits specified in this Agreement; or (2) the broader coverage and maximum limits of coverage of any insurance policy or proceeds available to the named insured; whichever is greater. No representation is made that the minimum Insurance requirements of this agreement are sufficient to cover the obligations of the CONSULTANT under this agreement.
- C. **Deductibles and SIR's.** Any deductibles or self-insured retentions in CONSULTANT's insurance policies must be declared to and approved by the PROJECT MANAGER and City Attorney and shall not reduce the limits of liability. Policies containing any self-insured retention (SIR) provision shall provide or be endorsed to provide that the SIR may be satisfied by either the named insured or LOCAL AGENCY or other additional insured party. At LOCAL AGENCY's option, the deductibles or self-insured retentions with respect to LOCAL AGENCY shall be reduced or eliminated to LOCAL AGENCY's satisfaction, or CONSULTANT shall procure a bond guaranteeing payment of losses and related investigations, claims administration, attorney's fees and defense expenses.
- D. **Proof of Insurance.** CONSULTANT shall provide to the PROJECT MANAGER or LOCAL AGENCY'S City Attorney all of the following: (1) Certificates of Insurance evidencing the insurance coverage required in this Agreement; (2) a copy of the policy declaration page and/or endorsement page listing all policy endorsements for the commercial general liability policy, and (3) excerpts of policy language or specific endorsements evidencing the other insurance requirements set forth in this Agreement. LOCAL AGENCY reserves the right to obtain a full certified copy of any insurance policy and endorsements from CONSULTANT. Failure to exercise this right shall not constitute a waiver of the right to exercise it later. The insurance shall be approved as to form and sufficiency by PROJECT MANAGER and the City Attorney.

## **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 other LOCAL AGENCY representatives who may consider written or verbal information submitted by CONSULTANT.
- B. Not later than thirty (30) 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. CONSULTANT must have a Division of Occupational Safety and Health (CAL-OSHA) permit(s), as outlined in California 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 LOCAL AGENCY, and CONSULTANT shall have no property right therein whatsoever. Immediately upon termination, LOCAL AGENCY shall be entitled to, and CONSULTANT shall deliver to LOCAL AGENCY, 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 LOCAL AGENCY 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 LOCAL AGENCY.
- 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 LOCAL AGENCY without restriction or limitation upon its use or dissemination by LOCAL AGENCY.
- 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 AGREEMENT. Any reuse by LOCAL AGENCY for another project or project location shall be at LOCAL AGENCY'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. All information related to the construction estimate is confidential and shall not be disclosed by CONSULTANT to any entity, other than LOCAL AGENCY, Caltrans, and/or FHWA. All of the materials prepared or assembled by CONSULTANT pursuant to performance of this AGREEMENT are confidential and CONSULTANT agrees that they shall not be made available to any individual or organization without the prior written approval of LOCAL AGENCY or except by court order. If CONSULTANT or any of its officers, employees, or subcontractors does voluntarily provide information in violation of this AGREEMENT, LOCAL AGENCY has the right to reimbursement and indemnity from CONSULTANT for any damages caused by CONSULTANT releasing the information, including, but not limited to, LOCAL AGENCY's attorney's fees and disbursements, including without limitation experts' fees and disbursements.

#### **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 RETENTION OF FUNDS**

No retainage will be held by the LOCAL AGENCY from progress payments due the CONSULTANT. Any retainage held by the CONSULTANT or subconsultants from progress payments due subconsultants shall be promptly paid in full to subconsultants within thirty (30) days after the subconsultant’s work is satisfactorily completed. Federal law (49 CFR §26.29) requires that any delay or postponement of payment over thirty (30) calendar days may take place only for good cause and with the LOCAL AGENCY’s prior written approval. Any violation of this provision shall subject the violating CONSULTANT or subconsultant to the penalties, sanctions and other remedies specified in Business and Professions Code §7108.5. These requirements shall not be construed to limit or impair any contractual, administrative, or judicial remedies, otherwise available to the CONSULTANT or subconsultant in the event of a dispute involving late payment or nonpayment by the CONSULTANT, deficient subconsultant performance, or noncompliance by a subconsultant. This provision applies to both DBE and non-DBE CONSULTANT and subconsultants.

**ARTICLE XXXII 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: Park Engineering, Inc.  
Steve Patterson, Vice President  
372 Village Square  
Orinda, CA 94563



LOCAL AGENCY: City of San Rafael  
Bill Guerin, Contract Administrator  
111 Morphew Street  
San Rafael, CA 94901

**ARTICLE XXXIII 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 XXXIV NO THIRD PARTY BENEFICIARIES**

LOCAL AGENCY and CONSULTANT do not intend, by any provision of this contract, to create in any third party, any benefit or right owed by one party, under the terms and conditions of this AGREEMENT, to the other party.

#### **ARTICLE XXXV COSTS AND ATTORNEY'S FEES**

The prevailing party in any action brought to enforce the terms and conditions of this AGREEMENT, or arising out of the performance of this AGREEMENT, may recover its reasonable costs (including claims administration) and attorney's fees expended in connection with such action.

#### **ARTICLE XXXVI LOCAL AGENCY BUSINESS LICENSE / OTHER TAXES**

CONSULTANT shall obtain and maintain during the duration of this contract, a LOCAL AGENCY business license as required by the San Rafael Municipal Code. CONSULTANT shall pay any and all state and federal taxes and any other applicable taxes. LOCAL AGENCY shall not be required to pay for any work performed under this contract, until CONSULTANT has provided LOCAL AGENCY with a completed Internal Revenue Service Form W-9 (Request for Taxpayer Identification Number and Certification).

#### **ARTICLE XXXVII WAIVERS**

The waiver by either party of any breach or violation of any term, covenant or condition of this AGREEMENT, or of any ordinance, law or regulation, shall not be deemed to be a waiver of any other term, covenant, condition, ordinance, law or regulation, or of any subsequent breach or violation of the same or other term, covenant, condition, ordinance, law or regulation. The subsequent acceptance by either party of any fee, performance, or other consideration which may become due or owing under this AGREEMENT, shall not be deemed to be a waiver of any preceding breach or violation by the other party of any term, condition, covenant of this contract or any applicable law, ordinance or regulation.

#### **ARTICLE XXXVIII APPLICABLE LAW**

The laws of the State of California shall govern this AGREEMENT.

CONSULTANT shall observe and comply with all applicable federal, state and local laws, ordinances, codes and regulations, in the performance of its duties and obligations under this AGREEMENT. CONSULTANT shall perform all services under this AGREEMENT in accordance with these laws, ordinances, codes and regulations. CONSULTANT shall release, defend, indemnify and hold harmless LOCAL AGENCY, its officers, agents and employees from any and all damages, liabilities, penalties, fines and all other consequences from any noncompliance or violation of any laws, ordinances, codes or regulations.



**ARTICLE XXXIX SIGNATURES**

CITY OF SAN RAFAEL

PARK ENGINEERING, INC.

\_\_\_\_\_  
JIM SCHUTZ  
City Manager

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

Title: \_\_\_\_\_

and

ATTEST:

\_\_\_\_\_  
LINDSAY LARA  
City Clerk

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

Title: \_\_\_\_\_

APPROVED AS TO FORM:

\_\_\_\_\_  
ROBERT F. EPSTEIN  
City Attorney

DRAFT

**FIRST AMENDMENT TO THE FEDERAL PROFESSIONAL SERVICES  
AGREEMENT WITH KIMLEY-HORN AND ASSOCIATES, INC. FOR THIRD  
STREET SAFETY IMPROVEMENTS PROJECT**

**THIS FIRST AMENDMENT** to the Federal Professional Services Agreement by and between the **CITY OF SAN RAFAEL** (hereinafter “**CITY**”), and **KIMLEY-HORN AND ASSOCIATES, INC.** (hereinafter “**CONSULTANT**”), is made and entered into as of the \_\_\_\_\_ day of \_\_\_\_\_, 202\_.

**RECITALS**

**WHEREAS**, the **CITY** and **CONSULTANT** entered into a Federal Professional Services Agreement dated March 3, 2020 to perform professional services in connection with **CITY’S** Third Street Safety Improvements Project, for an amount not to exceed \$280,000 (the “Agreement”); and

**WHEREAS**, **CITY** requires additional professional services from the **CONSULTANT**, and the **CONSULTANT** is willing to provide such services.

**AMENDMENT TO AGREEMENT**

**NOW, THEREFORE**, the parties hereby agree to amend the Agreement as follows:

1. Article III of the Agreement, entitled “STATEMENT OF WORK” is hereby amended to include the additional services set forth in **CONSULTANT’S** proposal dated April 8, 2022, attached to this First Amendment as Exhibit A and incorporated herein by reference.
2. Article V of the Agreement, entitled “ALLOWABLE COSTS AND PAYMENTS” is hereby amended to include additional compensation payable to **CONSULTANT** for the services described in Exhibit A to this first Amendment, on a Time and Materials basis in accordance with Exhibit A, in a not-to-exceed amount of \$40,000, and to change the total not-to-exceed amount under the Agreement to \$320,000.
3. Except as specifically amended herein, all of the other provisions, terms and obligations of the Agreement between the parties shall remain valid and shall be in full force.

**IN WITNESS WHEREOF**, the parties have executed this First Amendment on the day, month, and year first above written.

**CITY OF SAN RAFAEL**

**CONSULTANT**

\_\_\_\_\_  
JIM SCHUTZ, City Manager

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

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

Title: \_\_\_\_\_

ATTEST:

[If Contractor is a corporation, add signature of second corporate officer]

\_\_\_\_\_  
LINDSAY LARA, City Clerk

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

APPROVED AS TO FORM:

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

Title: \_\_\_\_\_

\_\_\_\_\_  
ROBERT F. EPSTEIN, City Attorney