

AGREEMENT FOR CONSULTING SERVICES

This is an Agreement between the City of Berkeley, a Charter City organized and existing under the laws of the State of California ("City"), and _____ ("Consultant"), a California [corporation, partnership, joint venture], doing business at _____ who agree as follows:

RECITALS

WHEREAS, this Agreement sets forth the terms and conditions under which City shall obtain and Consultant will provide the services identified in Appendix "A" attached hereto;

Now, THEREFORE, City and Consultant agree as follows:

1. DEFINITIONS

- 1.1 Where any word or phrase defined below, or a pronoun in place thereof, is used in any part of this Agreement, it shall have the meaning herein set forth.
 - 1.1.1 Agreement: This Agreement together with all attachments and appendices and other documents incorporated herein by reference.
 - 1.1.2 Project: Total design of _____ of which the Work performed under this Agreement may be whole or part.
 - 1.1.3 Project Manager: Person or persons designated by City and authorized to act on City's behalf with respect to this Agreement.
 - 1.1.4 Work: The work described in Appendix A "Scope of Services", and made a part of this Agreement.

2. TERM OF THIS AGREEMENT

- 2.1 This Agreement shall begin on _____ and end on _____. The City Manager of the City or his/her designee may extend the term of this Agreement by giving written notice.

3. SERVICES CONSULTANT AGREES TO PERFORM

Consultant agrees to perform the services provided for in Appendix "A", as authorized from time to time by City in writing, in the manner provided in this Agreement. Time is of the essence in the performance of this Agreement.

4. COMPENSATION

- 4.1 Compensation shall be due Consultant according to the Compensation Schedule established in Appendix "B", "Compensation for Services," in a total amount not to exceed \$ _____. Consultant shall invoice its time at its ordinary billing rates.
- 4.2 City will not withhold the entire payment if a questioned amount is involved, but will issue payment in the amount of the total invoice less any questioned amount. Payment for questioned amount(s) will be made upon City's receipt of any requested documentation verifying the questioned amount(s) and City's determination that the questioned amount(s) is reimbursable under the terms of this Agreement.
- 4.3 Invoices furnished by Consultant under this Agreement must be in a form acceptable to City. All amounts paid by City to Consultant shall be subject to audit by City. Payment shall be made by City to Consultant at the address stated in Appendix "A".

5. QUALIFIED PERSONNEL; NO SUBCONSULTING

- 5.1 Work under this Agreement shall be performed only by competent personnel under the supervision of and in the employment of Consultant. Consultant will conform with City's reasonable requests regarding assignment of personnel, but all personnel, including those assigned at City's request, shall be supervised by Consultant.
- 5.2 Consultant agrees that any personnel referred to in Appendix "A" will continue their assignments on the Project during the entire term of this Agreement, as described in Appendix "A."
- 5.3 Consultant is prohibited from subcontracting this Agreement or any part of it unless such subcontracting is approved by City in writing. Neither party shall, on the basis of this Agreement, contract on behalf of or in the name of the other party. An agreement made in violation of this provision shall confer no rights on any party and shall be null and void.

6. REPRESENTATIONS

- 6.1 Consultant represents that it is qualified to perform the Work and that it possesses the necessary licenses and/or permits required to perform the Work or will obtain such licenses and/or permits prior to time such licenses and/or permits are required.
- 6.2 Consultant represents that the Work shall be performed in a professional manner and shall conform to the standards of practice observed on similar, successfully completed projects by specialists in the Work to be provided. Consultant agrees that, if the Work is not so performed, in addition to all of its obligations under this Agreement and at law, Consultant shall reperform or replace unsatisfactory Work at no additional expense to City.
- 6.3 The granting of any progress payment by City, or the receipt thereof by Consultant, or any inspection, review, approval or oral statement by any representative of City, or State certification, shall in no way waive or limit the certification obligations in this Paragraph or lessen the liability of Consultant to reperform or replace unsatisfactory Work, including but not limited to cases where the unsatisfactory character of such work may not have been apparent or detected at the time of such payment, inspection, review or approval.
- 6.4 Nothing in this Paragraph shall constitute a waiver or limitation of any right or remedy, whether in equity or at law, which City or Consultant may have under this Agreement or any applicable law. All rights and remedies of City, whether under this Agreement or other applicable law, shall be cumulative.

7. INDEMNIFICATION BY CONSULTANT

- 7.1 General Liability. To the fullest extent permitted by law (including, without limitation, California Civil Code Sections 2782 and 2782.8), Consultant shall indemnify, defend and save harmless City from and against any and all claims, losses, costs, damages and expenses resulting from property damage, bodily injury or death (including reimbursement of reasonable attorneys' fees), to the extent arising out of the operations of Consultant, its subconsultants or anyone employed by them.
- 7.2 Professional Liability. Notwithstanding the foregoing or any other term(s) in this or any other agreement, with respect to Consultant's professional liability (as opposed to Consultant's operations covered by Commercial General Liability Insurance), to the fullest extent permitted by law (including, without limitation, California Civil Code Sections 2782 and 2782.8), Consultant shall indemnify and hold harmless City from any and all losses, costs, damages and expenses, (including the reimbursement of reasonable attorneys' fees), that arise out of, pertain to, or relate to the negligence, recklessness, or willful misconduct of the Consultant. In no event shall the cost to defend charged to Consultant exceed the Consultant's proportionate percentage of fault.

8. LIABILITY OF CITY

8.1 Notwithstanding any other provision of this Agreement, in no event shall City be liable, regardless of whether any claim is based on contract or tort, for any special, consequential, indirect or incidental damages, including, but not limited to, lost profits or revenue, arising out of or in connection with this Agreement or the services performed in connection with this Agreement.

9. INDEPENDENT CONTRACTOR; PAYMENT OF TAXES AND OTHER EXPENSES

9.1 Consultant shall be deemed at all times to be an independent contractor and shall be wholly responsible for the manner in which Consultant performs the services required of Consultant by the terms of this Agreement. Consultant shall be liable for its acts and omissions, and those of its employees and its agents. Nothing contained herein shall be construed as creating an employment, agency or partnership relationship between City and Consultant.

9.2 Terms in this Agreement referring to direction from City shall be construed as providing for direction as to policy and the result of Consultant's Work only and not as to the means or methods by which such a result is obtained.

9.3 Except as expressly provided in this Agreement, nothing in this Agreement shall operate to confer rights or benefits on persons or entities not party to this Agreement.

9.4 Payment of any taxes, including California Sales and use Taxes, levied upon this Agreement, the transaction, or the services or goods delivered pursuant hereto, shall be the obligation of Consultant.

10. INSURANCE

10.1 Prior to the execution of this Agreement, Consultant shall furnish to City satisfactory proof that Consultant has taken out for the entire period covered by this Agreement, as further defined below, the following insurance in a form satisfactory to City and with an insurance carrier satisfactory to City, authorized to do business in California and rated by A. M. Best & Company A minus or better, financial category size seven (7) or better, which will protect those described below from claims described below which arise or are alleged to have arisen out of or result from the services of Consultant for which Consultant may be legally liable, whether performed by Consultant, or by those employed directly or indirectly by it, or by anyone for whose acts Consultant may be liable:

10.1.1 Commercial general liability insurance, written on an "occurrence" basis, which shall provide coverage for bodily injury, death and property damage resulting from operations, products liability, blasting, explosion, collapse of buildings or structures, damage to underground structures and utilities, liability for slander, false arrest and invasion of privacy arising out of construction management operations, blanket contractual liability, broad form endorsement, a construction management endorsement, products and completed operations, personal and advertising liability, with per location limits of not less than \$2,000,000 general aggregate and \$2,000,000 each occurrence, subject to a deductible of not more than \$25,000 payable by Consultant.

10.1.2 Business automobile liability insurance with limits not less than \$1,000,000 each occurrence including coverage for owned, non-owned and hired vehicles, subject to a deductible of not more than \$10,000 payable by Consultant.

10.1.3 Full workers' compensation insurance for all persons whom Consultant may employ in carrying out Work contemplated under Contract, in accordance with Act of Legislature of State of California, known as "Workers' Compensation Insurance and Safety Act", approved May 26, 1913, and all Acts amendatory or supplemental thereto. Workers' compensation policy shall include Employer Liability Insurance with limits not less than \$1,000,000 each accident.

- 10.1.4 Professional Liability Insurance, specific to this Project only, with limits not less than \$2,000,000 each claim with respect to negligent acts, errors or omissions in connection with professional services to be provided under this Agreement, and any deductible not to exceed \$50,000 each claim, with no exclusion for claims of one insured against another insured.
- 10.2 Insurance policies shall contain an endorsement containing the following terms:
 - 10.2.1 City, and its directors, officers, partners, representatives, employees, consultants, subconsultants and agents, shall be named as additional insureds, but only with respect to liability arising out of the activities of the named insured, and there shall be a waiver of subrogation as to each named and additional insured.
 - 10.2.2 The policies shall apply separately to each insured against whom claim is made or suit is brought except with respect to the limits of the company's liability.
 - 10.2.3 Written notice of cancellation, non-renewal or of any material change in the policies shall be mailed to City thirty (30) days in advance of the effective date thereof.
 - 10.2.4 Insurance shall be primary insurance and no other insurance or self insured retention carried or held by any named or additional insureds other than the Consultant shall be called upon to contribute to a loss covered by insurance for the named insured.
- 10.3 Certificates of Insurance and Endorsements shall have clearly typed thereon the title of the Contract, shall clearly describe the coverage and shall contain a provision requiring the giving of written notice described above in subparagraph 10.2.3.
- 10.4 At the time of making an application for an extension of time, Consultant shall submit evidence that insurance policies will be in effect during requested additional period of time.
- 10.5 Nothing herein contained shall be construed as limiting in any way the extent to which Consultant or any of its permitted subcontractors or subconsultants may be held responsible for payment of damages resulting from their operations.
- 10.6 If Consultant fails to maintain any required insurance, City may take out such insurance, and deduct and retain amount of premium from any sums due Consultant under this Agreement.
- 10.7 Consultant shall forward all insurance documents to, _____, Office of Capital Projects, 1947 Center Street, First Floor, Berkeley, CA 94704.

11. SUSPENSION OF WORK

City may, without cause, order Consultant, in writing, to suspend, delay or interrupt Work pursuant to this Agreement, in whole or in part, for such periods of time as City may determine, in its sole discretion. Suspension shall be effected by delivery to Consultant of a written notice of suspension specifying the extent to which performance of the Work under this Agreement is suspended, and the date upon which the suspension becomes effective, which shall be no less than seven (7) calendar days from the date the notice of suspension is delivered. Suspension of Work shall be treated as an excusable delay.

12. TERMINATION OF AGREEMENT FOR CAUSE

12.1 If at any time City believes Consultant may not be adequately performing its obligations under this Agreement or may fail to complete the Work as required by this Agreement, City may request from Consultant written assurances of performance and a written plan to correct observed deficiencies in Consultant's performance if written notice of the same is provided by City. Failure to provide written assurances constitutes grounds to declare a default under this Agreement.

- 12.2 Consultant shall be in default of this Agreement and City may, in addition to any other legal or equitable remedies available to City, terminate Consultant's right to proceed under the Agreement, for cause, should Consultant commit a breach of this Agreement and not cure such breach within ten (10) calendar days of the date of notice from City to Consultant demanding such cure; or, if such failure is curable but not curable within such ten (10) day period, within such period of time as is reasonably necessary to accomplish such cure. (In order for Consultant to avail itself of this time period in excess of 10 calendar days, Consultant must provide City within the 10 day period a written plan acceptable to City to cure said breach, and then diligently commence and continue such cure according to the written plan.)
- 12.3 In the event a termination for cause is determined to have been made wrongfully or without cause, then the termination shall be treated as a termination for convenience, and Consultant shall have no greater rights than it would have had if a termination for convenience had been effected in the first instance. No other loss, cost, damage, expense or liability may be claimed, requested or recovered.

13. TERMINATION OF AGREEMENT FOR CONVENIENCE

- 13.1 City may terminate performance of the Work under the Agreement in accordance with this Paragraph in whole, or from time to time in part, whenever City shall determine that termination is in the best interest of City. Termination shall be effected by delivery to Consultant of notice of termination specifying the extent to which performance of the Work under the Agreement is terminated, and the date upon which termination becomes effective, which shall be no less than twenty-one (21) calendar days from the date the notice of termination is delivered. Consultant shall then be entitled to recover its costs expended up to that point plus a reasonable profit, but no other loss, cost, damage, expense or liability may be claimed, requested or recovered.
- 13.2 Except as provided in this Agreement, in no event shall City be liable for costs incurred by or on behalf of Consultant after the effective date of a notice of termination.
- 13.3 Termination under this provision shall not be construed as a waiver of any right or remedy otherwise available to City.

14. PROPRIETARY OR CONFIDENTIAL INFORMATION OF CITY

Consultant understands and agrees that, in the performance of the services under this Agreement or in the contemplation thereof, Consultant may have access to private or confidential information that may be owned or controlled by City and that such information may contain proprietary or confidential details, the disclosure of which to third parties may be damaging to City. Consultant agrees that all information disclosed by City to Consultant shall be held in confidence and used only in performance of the Agreement. Consultant shall exercise the same standard of care to protect such information as a reasonably prudent consultant would use to protect its own proprietary data.

15. NOTICES TO THE PARTIES

All notices to be given by the parties hereto shall be in writing and effective when served by depositing same in the United States Post Office, postage prepaid and addressed as follows:

To City:

To Consultant:

16. OWNERSHIP OF RESULTS/WORKS FOR HIRE

- 16.1 When this Agreement is terminated, Consultant agrees to return to City all documents, drawings, photographs and other written or graphic material, however produced, that it received from City, its contractors or agents, in connection with the performance of its services under this Agreement. All materials shall be returned in the same condition as received.
- 16.2 Any interest of Consultant or its subcontractors or subconsultants, in studies, reports, memoranda, computational sheets or other documents prepared by Consultant or its subcontractors or subconsultants in connection with services to be performed under this Agreement shall become the property of City. Consultant may, however, retain one copy for its files.
- 16.3 Any and all work, artwork, copy, posters, billboards, photographs, videotapes, audiotapes, systems designs, software, reports, designs, specifications, drawings, diagrams, surveys, source codes or any original works of authorship created by Consultant or its subcontractors or subconsultants in connection with services performed under this Agreement shall be works for hire as defined under Title 17 of the United States Code, and all copyrights in such works are the property of City. In the event that it is ever determined that any such works created by Consultant or its subcontractors or subconsultants under this Agreement are not works for hire under U.S. law, Consultant hereby assigns all copyrights to such works to City. With the prior written approval of City's Project Manager, Consultant may retain and use copies of such works for reference and as documentation of its experience and capabilities.

17. AUDIT AND INSPECTION OF RECORDS

- 17.1 Consultant shall maintain all drawings, specifications, calculations, cost estimates, quantity takeoffs, statements of costs and completion dates, schedules and all correspondence, internal memoranda, papers, writings, and documents of any sort prepared by or furnished to Consultant during the course of performing the Work and providing services with respect to the Project, for a period of at least three (3) years following final completion and acceptance of the Project, except that all such items pertaining to hazardous materials shall be maintained for at least thirty (30) years. All such records shall be available to City upon request at reasonable times and places. Monthly records of Consultant's personnel costs, consultant costs, and reimbursable expenses shall be kept on a generally recognized accounting basis, and shall be available to City upon request at reasonable times and places. Consultant shall not destroy any Project records until after advising City and allowing City to accept and store the records.
- 17.2 Consultant agrees to maintain and make available to City during business hours accurate books and accounting records relative to its activities under this Agreement. Consultant shall permit City to audit, examine and make copies, excerpts and transcripts from such books and records, and to make audits of all invoices, materials, payrolls, records or personnel and other data related to all other matters covered by this Agreement, whether funded in whole or in part under this Agreement. Consultant shall maintain such data and records in an accessible location and condition for a period of not less than five years after final payment under this Agreement or until after final audit has been resolved, whichever is later. The State of California or any federal agency having an interest in the subject of this Agreement shall have the same rights conferred upon City by this Paragraph.
- 17.3 The rights and obligations established pursuant to this Paragraph shall be specifically enforceable and survive termination of this Agreement.

18. DISPUTES

- 18.1 Should any question arise as to the meaning and intent of this Agreement, the question shall, prior to any other action or resort to any other legal remedy, be referred to the City's Project Manager and a principal of the Consultant who shall decide the true meaning and intent of the Agreement. Such referral may be initiated by written request from either party and a meeting between the City's Project Manager and principal of the Consultant shall take place within five days of the request.

18.2 Consultant shall continue its Work throughout the course of any and all disputes, and Consultant's failure to continue work during any and all disputes shall be considered a material breach of this Agreement, provided City continues to make payment to Consultant for undisputed work completed by Consultant. Consultant further agrees that should Consultant stop work due to a dispute or disputes, any and all claims, whether in law or in equity Consultant may have against City, their officers, agents, representatives, and employees, whether such claims are pending, anticipated or otherwise, shall be deemed to have been waived and forever barred.

19. AGREEMENT MADE IN CALIFORNIA/VENUE

19.1 This Agreement shall be deemed to have been executed in Alameda County. The formation, interpretation and performance of this Agreement shall be governed by the laws of the State of California, excluding its conflict of laws rules. Venue for all litigation relative to the formation, interpretation and performance of this Agreement shall be in Alameda County, California.

19.2 This Agreement shall be executed in duplicate. One duplicate original shall be retained by City and one duplicate original shall be given to Consultant.

20. CONFORMITY WITH LAW AND SAFETY

20.1 Consultant shall observe and comply with all applicable laws, ordinances, codes and regulations of governmental agencies, including federal, state, municipal and local governing bodies having jurisdiction over any or all of the scope of services, including all provisions of the Occupational Safety and Health Act of 1979 as amended, all California Occupational Safety and Health Regulations, the California Building Code, the American with Disabilities Act, any copyright, patent or trademark law and all other applicable federal, state, municipal and local safety regulations. All services performed by Consultant must be in accordance with these laws, ordinances, codes and regulations. Consultant's failure to comply with any laws, ordinances, codes or regulations applicable to the performance of the work hereunder shall constitute a breach of contract.

20.2 If a death, serious personal injury or substantial property damage occurs in connection with the performance of this Contract, Consultant shall immediately notify the City's Risk Manager by telephone. If any accident occurs in connection with this Contract, Consultant shall promptly submit a written report to City, in such form as the City may require. This report shall include the following information: 1) name and address of the injured or deceased person(s); 2) name and address of Consultant's subcontractor or subconsultant, if any; 3) name and address of Consultant's liability insurance carrier; and 4) a detailed description of the accident, including whether any of City's equipment, tools or materials were involved.

20.3 If a release of hazardous materials or hazardous waste that cannot be controlled occurs in connection with the performance of this Contract, Consultant shall immediately notify the Berkeley Police Department and the City's Health Protection office.

20.4 Consultant shall not store hazardous materials or hazardous waste within the City of Berkeley without a proper permit from the City.

21. MATERIAL SAFETY DATA SHEETS

21.1 To comply with the City's Hazardous Communication Program, Consultant agrees to submit Material Safety Data Sheets (MSDS) for all "hazardous substances" Consultant intends to use in the performance of work under this Contract in any City facility. "Hazardous substances" are defined as those substances so designated by the Director of Industrial Relations pursuant to the Hazardous Substances Information and Training Act (Labor Code sec. 6360 *et seq.*). The MSDS for all products must be submitted to the City before commencing work. The MSDS for a particular product must be reviewed and approved by the City's Risk Manager before Consultant may use that product.

21.2 City will inform Consultant about hazardous substances to which it may be exposed while on the job site and protective measures that can be taken to reduce the possibility of exposure.

22. NON-DISCRIMINATION

Consultant hereby agrees to comply with the provisions of Berkeley Municipal Code ("B.M.C.") Chapter 13.26 as amended from time to time. In the performance of this Contract, Consultant agrees as follows:

- 22.1 Consultant shall not discriminate against any employee or applicant for employment because of race, color, religion, ancestry, national origin, age (over 40), sex, pregnancy, marital status, disability, sexual orientation or AIDS.
- 22.2 Consultant shall permit the City access to records of employment, employment advertisements, application forms, EEO-1 forms, affirmative action plans and any other documents which, in the opinion of the City, are necessary to monitor compliance with this non-discrimination provision. In addition, Consultant shall fill-out, in a timely fashion, forms supplied by the City to monitor this non-discrimination provision.

23. CONFLICT OF INTEREST PROHIBITED

- 23.1 In accordance with Government Code section 1090, Berkeley City Charter section 36 and B.M.C. Chapter 3.64, neither Consultant nor any employee, officer, director, partner or member of Consultant, or immediate family member of any of the preceding, shall have served as an elected officer, an employee, or a City board, committee or commission member, who has directly or indirectly influenced the making of this Contract.
- 23.2 In accordance with Government Code section 1090 and the Political Reform Act, Government Code section 87100 *et seq.*, no person who is a director, officer, partner, trustee, employee or consultant of the Consultant, or immediate family member of any of the preceding, shall make or participate in a decision made by the City or a City board, commission or committee, if it is reasonably foreseeable that the decision will have a material effect on any source of income, investment or interest in real property of that person or Consultant.
- 23.3 Interpretation of this section shall be governed by the definitions and provisions used in the Political Reform Act, Government Code section 87100 *et seq.*, its implementing regulations, manuals and codes, Government Code section 1090, Berkeley City Charter section 36 and B.M.C. Chapter 3.64.

24. NUCLEAR FREE BERKELEY

Consultant agrees to comply with B.M.C. Chapter 12.90, the Nuclear Free Berkeley Act, as amended from time to time.

25. OPPRESSIVE STATES CONTRACTING PROHIBITION

- 25.1 In accordance with Resolution No. 59,853-N.S., Consultant certifies that it has no contractual relations with, and agrees during the term of this Contract to forego contractual relations to provide personal services to, the following entities:
 - (1) The governing regime in any Oppressive State.
 - (2) Any business or corporation organized under the authority of the governing regime of any Oppressive State.
 - (3) Any individual, firm, partnership, corporation, association, or any other commercial organization, including parent-entities and wholly-owned subsidiaries (to the extent that their operations are related to the purpose of its contract with the City), for the express purpose of assisting in business operations or trading with any public or private entity located in any Oppressive State.

- 25.2 Appendix A to Resolution No. 59,853-N.S. designates the following as Oppressive States for the purposes of this contract: Tibet Autonomous Region and the provinces of Amdo, Kham, and U-Tsang.
- 25.3 Consultant's failure to comply with this section shall constitute a default of this Contract and City may terminate this Contract pursuant to Section 12. In the event that the City terminates Consultant due to a default under this provision, City may deem Consultant a non-responsible bidder for five (5) years from the date this Contract is terminated.

26. RECYCLED PAPER FOR WRITTEN REPORTS

If Consultant is required by this Contract to prepare a written report or study, Consultant shall use recycled paper for said report or study when such paper is available at a cost of not more than ten percent more than the cost of virgin paper, and when such paper is available at the time it is needed. For the purposes of this Contract, recycled paper is paper that contains at least 50% recycled product. If recycled paper is not available, Consultant shall use white paper. Written reports or studies prepared under this Contract shall be printed on both sides of the paper whenever practical.

27. BERKELEY LIVING WAGE ORDINANCE

27.1. Consultant hereby agrees to comply with the provisions of the Berkeley Living Wage Ordinance, B.M.C. Chapter 13.27. If Consultant is currently subject to the Berkeley Living Wage Ordinance, as indicated by the Living Wage Certification form, attached hereto, Consultant will be required to provide all eligible employees with City mandated minimum compensation during the term of this Contract, as defined in B.M.C. Chapter 13.27, as well as comply with the terms enumerated herein. Consultant expressly acknowledges that, even if Consultant is not currently subject to the Living Wage Ordinance, cumulative contracts with City may subject Consultant to the requirements under B.M.C. Chapter 13.27 in subsequent contracts.

27.2. If Consultant is currently subject to the Berkeley Living Wage Ordinance, Consultant shall be required to maintain monthly records of those employees providing service under the Contract. These records shall include the total number of hours worked, the number of hours spent providing service under this Contract, the hourly rate paid, and the amount paid by Consultant for health benefits, if any, for each of its employees providing services under the Contract. Consultant agrees to supply City with any records it deems necessary to determine compliance with this provision. These records are expressly subject to the auditing terms described in Section 17.

27.3. If Consultant is currently subject to the Berkeley Living Wage Ordinance, Consultant shall include the requirements thereof, as defined in B.M.C. Chapter 13.27, in any and all subcontracts in which Consultant engages to execute its responsibilities under this Contract. All subcontractor or subconsultant employees who spend 25% or more of their compensated time engaged in work directly related to this Contract shall be entitled to a living wage, as described in B.M.C. Chapter 13.27 and herein.

27.4. If Consultant fails to comply with the requirements of this Section, the City shall have the rights and remedies described in this Section, in addition to any rights and remedies provided by law or equity.

27.5. Consultant's failure to comply with this Section shall constitute a material breach of the Contract, upon which City may terminate this Contract pursuant to Section 12. In the event that City terminates Consultant due to a default under this provision, City may deem Consultant a non-responsible bidder for not more than five (5) years from the date this Contract is terminated.

In addition, at City's sole discretion, Consultant may be responsible for liquidated damage in the amount of \$50 per employee per day for each and every instance of an underpayment to an employee. It is mutually understood and agreed that Consultant's failure to pay any of its eligible employees at least the applicable living wage rate will result in damages being sustained by the City; that the nature and amount of the damages will be extremely difficult and impractical to fix; that the liquidated damage set forth herein is the nearest and most exact measure of damage for such breach that can be fixed at this time; and that the liquidated damage amount is not intended as a penalty of forfeiture for Consultant's breach. City may deduct any assessed liquidated damages from any

payments otherwise due Consultant.

28. BERKELEY EQUAL BENEFITS ORDINANCE

28.1. Consultant hereby agrees to comply with the provisions of the Berkeley Equal Benefits Ordinance, B.M.C. Chapter 13.29. If Consultant is currently subject to the Berkeley Equal Benefits Ordinance, as indicated by the Equal Benefits Certification form, attached hereto, Consultant will be required to provide all eligible employees with City mandated equal benefits, as defined in B.M.C. Chapter 13.29, during the term of this contract, as well as comply with the terms enumerated herein.

28.2. If Consultant is currently or becomes subject to the Berkeley Equal Benefits Ordinance, Consultant agrees to provide the City with all records the City deems necessary to determine compliance with this provision. These records are expressly subject to the auditing terms described in Section 17 of this contract.

28.3. If Consultant fails to comply with the requirements of this Section, City shall have the rights and remedies described in this Section, in addition to any rights and remedies provided by law or equity.

28.4. Consultant's failure to comply with this Section shall constitute a material breach of the Contract, upon which City may terminate this contract pursuant to Sections 12. In the event the City terminates this contract due to a default by Consultant under this provision, the City may deem Consultant a non-responsible bidder for not more than five (5) years from the date this Contract is terminated.

In addition, at City's sole discretion, Consultant may be responsible for liquidated damages in the amount of \$50.00 per employee per day for each and every instance of violation of this Section. It is mutually understood and agreed that Consultant's failure to provide its employees with equal benefits will result in damages being sustained by City; that the nature and amount of these damages will be extremely difficult and impractical to fix; that the liquidated damages set forth herein is the nearest and most exact measure of damages for such breach that can be fixed at this time; and that the liquidated damage amount is not intended as a penalty or forfeiture for Consultant's breach. City may deduct any assessed liquidated damages from any payments otherwise due Consultant.

29. PREVAILING WAGES

Certain labor categories under this contract may be subject to prevailing wages as identified in the State of California Labor Code commencing with Sections 1720 et. seq. and 1770 et. seq. These labor categories, when employed for any "work performed during the design and preconstruction phases of construction including, but not limited to, inspection and land surveying work," constitute a "Public Work" within the definition of Section 1720(a)(1) of the California Labor Code requiring payment of prevailing wages. In performing its obligations under this contract, Consultant is solely responsible to determine which, if any, of the work is governed by a labor category pursuant to California Labor Code sections 1720 et. seq. and 1770 et. seq. and pay the pertinent prevailing wage. Consultant shall defend, indemnify and hold harmless City concerning any liability arising out of Labor Code section 1720 et. seq. and 1770 et. seq.

30. SETOFF AGAINST DEBTS

Consultant agrees that City may deduct from any payments due to Consultant under this Contract any monies that consultant owes City under any ordinance, contract or resolution for any unpaid taxes, fees, licenses, unpaid checks or other amounts.

31. CONSULTANTS TO SUBMIT STATEMENTS OF ECONOMIC INTEREST

The City's Conflict of Interest Code, Resolution No. 60,788-N.S., as amended, requires consultants who make a governmental decision or act in a staff capacity as defined in 2 Cal. Code of Regs. § 18700, as amended from time to time, to disclose conflicts of interest by filing a Statement of Economic Interest (Form 700). Consultants agree to file such statements with the City Clerk at the beginning of the contract period and upon termination of the Consultant's service.

32. CITY BUSINESS LICENSE, PAYMENT OF TAXES, TAX I.D. NUMBER

Consultant has obtained a City business license as required by B.M.C. Chapter 9.04, and its license number is written below; or, Consultant is exempt from the provisions of B.M.C. Chapter 9.04 and has written below the specific B.M.C. section under which it is exempt. Consultant shall pay all state and federal income taxes and any other taxes due. **Consultant certifies under penalty of perjury that the taxpayer identification number written below is correct.**

33. MISCELLANEOUS

33.1 The Agreement, and any written modification to the Agreement, shall represent the entire and integrated Agreement between the parties hereto regarding the subject matter of this Agreement and shall constitute the exclusive statement of the terms of the parties' Agreement. The Agreement, and any written modification to the Agreement, shall supersede any and all prior negotiations, representations or agreements, either written or oral, express or implied, that relate in any way to the subject matter of this Agreement or written modification, and the parties represent and agree that they are entering into this Agreement and any subsequent written modification in sole reliance upon the information set forth in the Agreement or written modification and the parties are not and will not rely on any other information.

33.2 Either party's waiver of any breach, or the omission or failure of either party, at any time, to enforce any right reserved to it, or to require performance of any of the terms, covenants, conditions or other provisions of this Agreement, including the timing of any such performance, shall not be a waiver of any other right to which any party is entitled, and shall not in any way affect, limit, modify or waive that party's right thereafter to enforce or compel strict compliance with every term, covenant, condition or other provision hereof, any course of dealing or custom of the trade or oral representations notwithstanding. This Agreement may not be modified, nor may compliance with any of its terms be waived, except by written instrument executed and approved by fully authorized representatives of City and the Consultant.

33.3 As between the parties to this Agreement: as to all acts or failures to act by either party to this Agreement, any applicable statute of limitations shall commence to run on the date of issuance by City's Project Manager of the final Certificate for Payment, or termination of this Agreement, whichever is earlier, except for latent defects, for which the statute of limitation shall begin running upon discovery of the defect and its cause.

33.4 Any provisions or portions thereof of this Agreement prohibited by, or made unlawful or unenforceable under any applicable law of any jurisdiction, shall as to such jurisdiction be ineffective without affecting other provisions or portions thereof of this Agreement. If the provisions of such applicable law may be waived, they are hereby waived to the end that this Agreement may be deemed to be a valid and binding agreement enforceable in accordance with its terms. If any provisions or portion thereof of this Agreement are prohibited by, or made unlawful or unenforceable under any applicable law and are therefore stricken or deemed waived, the remainder of this Agreement shall be interpreted to achieve the goals or intent of the stricken or waived provisions or portions thereof to the extent such interpretation is consistent with applicable law.

34. SEVERABILITY

34.1 If any part of this Agreement or the application thereof is declared invalid for any reason, such invalidity shall not affect the other provisions of this Agreement which can be given effect without the invalid provision or application, and to this end the provisions of this Agreement are declared to be severable.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement the day first mentioned above.

THE CITY OF BERKELEY

By: _____
CITY MANAGER

Registered:

Pre-approved as to form:
CITY ATTORNEY
12/2018

By: _____
CITY AUDITOR

Attest:

By: _____
CITY CLERK

[CONSULTANT NAME]

By: _____

Printed name and title of signatory, if different from consultant name

Taxpayer Identification No.
Berkeley Business License No.
Incorporated: Yes____ No____
Certified Woman Business Enterprise: Yes ____ No ____
Certified Minority Business Enterprise: Yes____ No____
If yes, state ethnicity:_____
Certified Disadvantaged Business Enterprise: Yes____ No____