

1 entitled to receive payment. Each invoice shall be accompanied by a progress report
2 indicating the progress to date of services performed and covered by the invoice,
3 including a brief statement of any Project problems and potential causes of delay in
4 performance, and listing those services that are projected for performance by Contractor
5 during the next invoice cycle. Where billing is done and payment is made on an hourly
6 basis, the parties acknowledge that this arrangement is either customary practice for
7 Contractor's profession, industry, or business, or is necessary to satisfy audit and legal
8 requirements which may arise due to the fact that City is a municipality.

9 C. Contractor represents that Contractor has obtained all necessary
10 information on conditions and circumstances that may affect its performance and has
11 conducted site visits, if necessary.

12 2. TERM. The term of this Agreement shall commence on December 15,
13 2006 and shall terminate on December 15, 2009, unless sooner terminated as provided
14 in this Agreement, or unless the services or the Project is completed sooner.

15 3. COORDINATION AND ORGANIZATION.

16 A. Contractor shall coordinate its performance with City's representative.
17 Contractor shall advise and inform City's representative of the work in progress on the
18 Project in sufficient detail so as to assist City's representative in making presentations
19 and in holding meetings on the Project.

20 4. INDEPENDENT CONTRACTOR. In performing its services, Contractor
21 is and shall act as an independent contractor and not an employee, representative, or
22 agent of City. Contractor shall have control of Contractor's work and the manner in which
23 it is performed. Contractor shall be free to contract for similar services to be performed for
24 others during this Agreement provided, however, that Contractor acts in accordance with
25 Section 9 and Section 11 of this Agreement. Contractor acknowledges and agrees that a)
26 City will not withhold taxes of any kind from Contractor's compensation, b) City will not
27 secure workers' compensation or pay unemployment insurance to, for or on Contractor's
28 behalf, and c) City will not provide and Contractor is not entitled to any of the usual and

1 customary rights, benefits or privileges of City employees. Contractor expressly warrants
2 that neither Contractor nor any of Contractor's employees or agents shall represent
3 themselves to be employees or agents of City.

4 5. INSURANCE. As a condition precedent to the effectiveness of this
5 Agreement, Contractor shall procure and maintain at Contractor's expense for the
6 duration of this Agreement from insurance companies that are admitted to write
7 insurance in California or from authorized non-admitted insurance companies that have
8 ratings of or equivalent to A:VIII by A.M. Best Company the following insurance:

9 (a) Commercial general liability insurance (equivalent in scope to ISO form
10 CG 00 01 11 85 or CG 00 01 11 88) in an amount not less than \$1,000,000 per each
11 occurrence and \$2,000,000 general aggregate. This coverage shall include but not be
12 limited to broad form contractual liability, cross liability, independent contractor's liability,
13 and products and completed operations liability. The City, its officials, employees and
14 agents shall be named as additional insureds by endorsement (on City's endorsement
15 form or on an endorsement equivalent in scope to ISO form CG 20 10 11 85 or to both
16 CG 20 10 10 01 and CG 20 37 10 01), and this insurance shall contain no special
17 limitations on the scope of protection given to the City, its officials, employees and
18 agents.

19 (b) Workers' Compensation insurance as required by the California Labor
20 Code and employer's liability insurance in an amount not less than \$1,000,000.

21 (c) Professional liability or errors and omissions insurance in an amount not
22 less than \$1,000,000 per claim.

23 (d) Commercial automobile liability insurance (equivalent in scope to ISO
24 form CA 00 01 06 92), covering Auto Symbol 1 (Any Auto) in an amount not less than
25 \$500,000 combined single limit per accident.

26 Any self-insurance program, self-insured retention, or deductible must be
27 separately approved in writing by City's Risk Manager or designee and shall protect City,
28 its officials, employees and agents in the same manner and to the same extent as they

1 would have been protected had the policy or policies not contained retention or
2 deductible provisions. Each insurance policy shall be endorsed to state that coverage
3 shall not be reduced, non-renewed, or canceled except after thirty (30) days prior written
4 notice to City, and shall be primary and not contributing to any other insurance or self-
5 insurance maintained by City. Contractor shall notify the City in writing within five (5) days
6 after any insurance has been voided by the insurer or cancelled by the insured. If this
7 coverage is written on a "claims made" basis, it must provide for an extended reporting
8 period of not less than one year, commencing on the date this Agreement expires or is
9 terminated, unless Contractor guarantees that Contractor will provide to the City evidence
10 of uninterrupted, continuing coverage for a period of not less than three (3) years,
11 commencing on the date this Agreement expires or is terminated.

12 Contractor shall require that all subcontractors and contractors which
13 Contractor uses in the performance of services maintain insurance in compliance with
14 this Section unless otherwise agreed in writing by City's Risk Manager or designee.

15 Prior to the start of performance, Contractor shall deliver to City certificates
16 of insurance and endorsements for approval as to sufficiency and form. In addition,
17 Contractor, shall, within thirty (30) days prior to expiration of the insurance furnish to City
18 certificates of insurance and endorsements evidencing renewal of the insurance. City
19 reserves the right to require complete certified copies of all policies of Contractor and
20 Contractor's subcontractors and consultants, at any time. Contractor shall make available
21 to City's Risk Manager or designee all books, records and other information relating to
22 the insurance, during normal business hours.

23 Any modification or waiver of these insurance requirements shall only be
24 made with the approval of City's Risk Manager or designee. Not more frequently than
25 once a year, the City's Risk Manager or designee may require that Contractor or
26 Contractor's subcontractors, change the amount, scope or types of coverages if, in his or
27 her sole opinion, the amount, scope, or types of coverages are not adequate.

28 The procuring or existence of insurance shall not be construed or deemed

1 as a limitation on liability relating to Contractor's performance or as full performance of or
2 compliance with the indemnification provisions of this Agreement.

3 6. ASSIGNMENT AND SUBCONTRACTING. This Agreement
4 contemplates the personal services' of Contractor and Contractor's employees, and the
5 parties acknowledge that a substantial inducement to City for entering this Agreement
6 was and is the professional reputation and competence of Contractor and Contractor's
7 employees. Contractor shall not assign its rights or delegate its duties under this
8 Agreement, or any interest in this Agreement, or any portion hereof, without the prior
9 written approval of City, except that Contractor may with the prior approval of the City
10 Manager of City, assign any moneys due or to become due the Contractor under this
11 Agreement. Any attempted assignment or delegation shall be void, and any assignee or
12 delegate shall acquire no right or interest by reason of an attempted assignment or
13 delegation. Furthermore, Contractor shall not subcontract any portion of its performance
14 without the prior approval of the City Manager or designee or substitute a subcontractor
15 or contractor without the prior approval to the substitution. Nothing stated in this Section
16 shall prevent Contractor from employing as many employees as Contractor deems
17 necessary for performance, of this Agreement.

18 7. CONFLICT OF INTEREST. Contractor, by executing this Agreement,
19 certifies that, at the time Contractor executes this Agreement and for its duration,
20 Contractor does not and will not perform services for any other client which would create
21 a conflict, whether monetary or otherwise, as between the interests of City under this
22 Agreement and the interests of that other client. And, Contractor shall obtain similar
23 certifications from Contractor's employees and subcontractors.

24 8. MATERIALS. Contractor shall furnish all labor and supervision, supplies,
25 material, tools, machinery, equipment, appliances, transportation, and services
26 necessary to or used in the performance of Contractor's obligations hereunder.

27 9. OWNERSHIP OF DATA. All materials, information and data prepared,
28 developed, or assembled by Contractor or furnished to Contractor in connection with this

1 Agreement, including but not limited to documents, estimates, calculations, studies,
2 maps, graphs, charts, computer disks, computer source documentation, samples,
3 models, reports, summaries, drawings, designs, notes, plans, information, material, and
4 memorandum ("Data") shall be the exclusive property of City. Data shall be given to City,
5 and City shall have the unrestricted right to use and disclose the Data in any manner and
6 for any purpose without payment of further compensation to Contractor. Copies of Data
7 may be retained by Contractor but Contractor warrants that Data shall not be made
8 available to any person or entity for use without the prior approval of City. This warranty
9 shall survive termination of this Agreement for five (5) years.

10 10. TERMINATION. Either party shall have the right to terminate this
11 Agreement for any reason or no reason at any time by giving fifteen (15) calendar days
12 prior written notice to the other party. In the event of termination under this Section, City
13 shall pay Contractor for services satisfactorily performed and costs incurred up to the
14 effective date of termination for which Contractor has not been previously paid. The
15 procedures for payment in Section 1.C. with regard to invoices shall apply.

16 11. CONFIDENTIALITY. Contractor shall keep the Data confidential and
17 shall not disclose the Data or use the Data directly or indirectly other than in the course of
18 performing its services during the term of this Agreement and for five (5) years following
19 expiration or termination of this Agreement. In addition, Contractor shall keep confidential
20 all information, whether written, oral, or visual, obtained by any means whatsoever in the
21 course of performing its services for the same period of time. Contractor shall not
22 disclose any or all of the Data to any third party or use it for Contractor's own benefit or
23 the benefit of others except for the purpose of this Agreement.

24 12. BREACH OF CONFIDENTIALITY. Contractor shall not be liable for a
25 breach of confidentiality with respect to Data that: (a) Contractor demonstrates Contractor
26 knew prior to the time City disclosed it; or (b) Is or becomes publicly available without
27 breach of this Agreement by Contractor; or (c) A third party who has a right to disclose
28 does so to Contractor without restrictions on further disclosure; or (d) Must be disclosed

1 pursuant to subpoena or court order.

2 13. ADDITIONAL COSTS AND REDESIGN.

3 A. Any costs incurred by the City due to Contractor's failure to meet the
4 standards required by the Scope of Work or Contractor's failure to perform fully the tasks
5 described in the Scope of Work which, in either case, causes the City to request that
6 Contractor perform again all or a part of the Scope of Work shall be at the sole cost of
7 Contractor and City shall not pay any additional compensation to Contractor for its re-
8 performance.

9 B. If the Project involves construction and the scope of work requires
10 Contractor to prepare plans and specifications with an estimate of the cost of
11 construction, then Contractor may be required to modify the plans and specifications, any
12 construction documents relating to the plans and specifications, and Contractor's
13 estimate, at no cost to City, when the lowest bid for construction received by City
14 exceeds by more than ten percent (10%) Contractor's estimate. This modification shall be
15 submitted in a timely fashion to allow City to receive new bids within four (4) months of
16 the date on which the original plans and specifications were submitted by Contractor.

17 14. AMENDMENT. This Agreement, including all Exhibits, shall not be
18 amended, nor any provision or breach waived, except in writing signed by the parties
19 which expressly refers to this Agreement.

20 15. LAW. This Agreement shall be governed by and construed pursuant to
21 the laws of the State of California (except those provisions of California law pertaining to
22 conflicts of laws). Contractor shall comply with all laws, ordinances, rules and regulations
23 of and obtain all permits, licenses, and certificates required by all federal, state and local
24 governmental authorities.

25 16. ENTIRE AGREEMENT. This Agreement, including all Exhibits,
26 constitutes the entire understanding between the parties and supersedes all other
27 agreements, oral or written, with respect to the subject matter in this Agreement.

28 17. INDEMNITY. Contractor shall indemnify and hold harmless the City, its

1 Boards, Commissions, and their officials, employees and agents (collectively in this
2 Section "City") from and against any and all liability, claims, demands, damage, causes of
3 action, proceedings, penalties, loss, costs, and expenses (including attorney's fees, court
4 costs, and expert and witness fees) (collectively "Claims or individually "Claim"). Claims
5 include allegations and include by way of example but are not limited to: Claims for
6 property damage, personal injury or death arising in whole or in part from any negligent
7 act or omission of Contractor, its officers, employees, agents, sub-Contractors, or anyone
8 under Contractor's control (collectively "Indemnitor"); Contractor's breach of this
9 Agreement; misrepresentation; willful misconduct; and Claims by any employee of
10 Indemnitor relating in any way to worker's compensation. Independent of the duty to
11 indemnify and as a free-standing duty on the part of Contractor, Contractor shall defend
12 City and shall continue such defense until the Claim is resolved, whether by settlement,
13 judgment or otherwise. Contractor shall notify the City of any claim within ten (10) days.
14 Likewise, City shall notify Contractor of any claim, shall tender the defense of such claim
15 to Contractor, and shall assist Contractor, as may be reasonably requested, in such
16 defense.

17 18. AMBIGUITY. In the event of any conflict or ambiguity between this
18 Agreement and any Exhibit, the provisions of this Agreement shall govern.

19 19. COSTS. If there is any legal proceeding between the parties to enforce
20 or interpret this Agreement or to protect or establish any rights or remedies under this
21 Agreement, the prevailing party shall be entitled to its costs and expenses, including
22 reasonable attorneys' fees and court costs (including appeals).

23 20. NONDISCRIMINATION. In connection with performance of this
24 Agreement and subject to applicable rules and regulations, Contractor shall not
25 discriminate against any employee or applicant for employment because of race, religion,
26 national origin, color, age, sex, sexual orientation, AIDS, HIV status, handicap, or
27 disability. Contractor shall ensure that applicants are employed, and that employees are
28 treated during their employment, without regard to these bases. These actions shall

1 include, but not be limited to, the following: employment, upgrading, demotion or transfer,
2 recruitment or recruitment advertising, layoff or termination, rates of pay or other forms of
3 compensation, and selection for training, including apprenticeship.

4 It is the policy of City to encourage' the participation of Disadvantaged,
5 Minority and Women-owned Business Enterprises in City's procurement process, and
6 Contractor agrees to use its best efforts to carry out this policy in the hiring of Contractors
7 to the fullest extent consistent with the efficient performance of this Agreement.
8 Contractor may rely on written representations by Consultants and Subcontractors
9 regarding their status. Contractor shall report to City in May and in December or, in the
10 case of short-term agreements, prior to invoicing for final payment, the names of all
11 subconsultants and contractors hired by Contractor for this Project and information on
12 whether or not they are a Disadvantaged, Minority or Women-owned Business
13 Enterprise, as defined in Section 8 of the Small Business Act (15 U.S.C. Sec. 637).

14 21. NOTICES. Any notice or approval required under this Agreement shall
15 be in writing and personally delivered or deposited in the U.S. Postal Service, first class,
16 postage prepaid, addressed to Contractor at the address first stated above, and to the
17 City at 333 West Ocean Boulevard, Long Beach, California 90802 Attn: City Manager.
18 Notice of change of address shall be given in the same manner as stated for other
19 notices. Notice shall be deemed given on the date deposited in the mail or on the date
20 personal delivery is made, whichever first occurs.

21 22. COVENANT AGAINST CONTINGENT FEES. Contractor warrants that
22 Contractor has not employed or retained any entity or person to solicit or obtain this
23 Agreement and that Contractor has not paid or agreed to pay any entity or person any
24 fee, commission, or other monies based on or from the award of this Agreement. If
25 Contractor breaches this warranty, City shall have the right to terminate this Agreement
26 immediately notwithstanding the provisions of Section 10 hereof or, in its discretion, to
27 deduct from payments due under this Agreement or otherwise recover the full amount of
28 the fee, commission, or other monies.

1 23. WAIVER. The acceptance of any services or the payment of any money
2 by City shall not operate as a waiver of any provision of this Agreement, or of any right to
3 damages or indemnity stated in this Agreement. The waiver of any breach of this
4 Agreement shall not constitute a waiver of any other or subsequent breach of this
5 Agreement.

6 24. CONTINUATION. Termination or expiration of this Agreement shall not
7 affect rights or liabilities of the parties which accrued pursuant to Sections 7, 9, 10, 11,
8 16, 18, 21, and 27 prior to termination or expiration of this Agreement.

9 25. TAX REPORTING. As required by federal and state law, City is
10 obligated to and will report the payment of compensation to Contractor on Form 1099-
11 Misc. Contractor shall be solely responsible for payment of all federal and state taxes
12 resulting from payments under this Agreement. Contractor's Employer Identification
13 Number is [REDACTED] If Contractor has a Social Security Number rather than an
14 Employer Identification Number, then Contractor shall submit that Social Security
15 Number in writing to City's Accounts Payable, Department of Financial Management.
16 Contractor acknowledges and agrees that City has no obligation to pay Contractor until
17 Contractor provides one of these numbers.

18 26. ADVERTISING. Contractor shall not use the name of City, its officials or
19 employees in any advertising or solicitation for business, nor as a reference, without the
20 prior approval of the City Manager or designee.

21 27. AUDIT. City shall have the right at all reasonable times during the term
22 of this Agreement and for a period of five (5) years after termination or expiration of this
23 Agreement to examine, audit, inspect, review, extract information from, and copy all
24 books, records, accounts, and other documents of Contractor relating to this Agreement.

25 28. THIRD PARTY BENEFICIARY. This Agreement is intended by the
26 parties to benefit themselves only and is not in any way intended or designed to or
27 entered for the purpose of creating any benefit or right for any person or entity of any kind
28 that is not a party to this Agreement.

OFFICE OF THE CITY ATTORNEY
ROBERT E. SHANNON, City Attorney
333 West Ocean Boulevard, 11th Floor
Long Beach, CA 90802-4664

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IN WITNESS WHEREOF, the parties have caused this document to be
duly executed with all formalities required by law as of the date first stated herein.

CUMMINS CAL PACIFIC, LLC.

Oct 15, 2007

By Mark Yragui
President

MARK YRAGUI

(Type or Print Name)

Oct. 15 2007

By David A. Briggs
Secretary CFO

DAVID A. BRIGGS

(Type or Print Name)

"Contractor"

City of Long Beach

10/23 2007

By Pat H. West
City Manager

"City"

This Agreement is approved as to form on Oct. 22 2007.

ROBERT E. SHANNON, CITY ATTORNEY

By Dan J. Anderson
Deputy

GJA:ikm 07-04681