

**Agreement for the Design, Installation, Implementation, and  
Maintenance of a Process Control System**

**Between**

**Orange County Sanitation District**

**and**

**ABB Inc.**



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- EXHIBIT 2 – Project J120 Scope of Work
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- EXHIBIT 4 – Unit Prices
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## **Agreement for the Design, Installation, Implementation, and Maintenance of a Process Control System**

This Agreement for the Design, Installation, Implementation, and Maintenance of a Process Control System (“Agreement”) is entered into by and between the Orange County Sanitation District, a county sanitation district (“SANITATION DISTRICT”) and ABB Inc., a Delaware corporation, (“CONTRACTOR”) and is dated as of July 28, 2021.

### **RECITALS**

**WHEREAS**, the SANITATION DISTRICT owns and operates two wastewater treatment plants, nearly 400 miles of regional trunk sewers, and 15 lift/pump stations; and

**WHEREAS**, the SANITATION DISTRICT’s existing process control system utilizes a Supervisory Control and Data Acquisition (“SCADA”) Platform running Copeland Roland Interpreted Sequential Processor (“CRISP”) software and other commercial-off-the-shelf software to communicate with the Schneider Electric Modicon Quantum and M580 Programmable Logic Controllers (“Modicon PLCs”); and

**WHEREAS**, many elements of this SCADA Platform are outdated, and it is becoming increasingly difficult to procure services and parts for the SCADA Platform; and

**WHEREAS**, the SANITATION DISTRICT desires to meet new challenges for efficient operations, maintenance, management and regulatory reporting, and knowledge management by replacing the existing DEC VAX/VMS-based SCADA Platform running the CRISP SCADA software with a modern Windows-based SCADA Platform and continue to communicate with the existing Modicon PLCs; and

**WHEREAS**, a unified and modern SCADA Platform for the entire SANITATION DISTRICT asset base has been determined to be a profound enabler to meet the SANITATION DISTRICT’s current, new, and emerging efficiency requirements; and

**WHEREAS**, standardization of the SCADA Platform elements, engineering processes, and repeat-use libraries are required to maximize the SANITATION DISTRICT’s efficiency for programming, troubleshooting, and maintaining the SCADA Platform; and

**WHEREAS**, on the effective date of this Agreement, the SANITATION DISTRICT requires a high-availability and high-performance SCADA Platform that is fully-licensed to meet or exceed the requirements in Specification Section 17440, Performance, Growth, and Licensing, attached to the Request for Proposals (RFP) such that the SANITATION DISTRICT can grow its capabilities at no additional license cost; and

**WHEREAS**, the SANITATION DISTRICT developed an RFP for a comprehensive suite of unit prices for products and services to be guaranteed for the duration of the Agreement; and

**WHEREAS**, in order to pre-qualify firms to receive the RFP, the SANITATION DISTRICT issued a Request for Qualifications for the Process Control System Upgrades Project (RFQ) to firms who are manufacturers and experts in the design, development, procurement, installation, and start-up of SCADA Platforms and who can guarantee the long-term product viability, system performance, and reliability; and

**WHEREAS**, based on the Statements of Qualifications (“SOQs”) received, the SANITATION DISTRICT established a candidate list of qualified firms to advance to the proposal phase; and

**WHEREAS**, the SANITATION DISTRICT issued an RFP to prequalified firms to further evaluate the technical merit of the proposed SCADA Platforms and project delivery approach through written proposals, hands-on reviews in proposer trials, and proposer interviews; to establish long-term guaranteed prices; and a fixed price for the first project to be performed under this Agreement (“Project J-120”); and

**WHEREAS**, the SANITATION DISTRICT evaluated the SOQs and proposals of such firms based on commercial and technical compliance with all Contract Documents, as defined in the General Conditions herein; project delivery approach; product technical requirements; pricing of equipment, products, and services; experience of team members; and long-term viability of the firms, including their product lines, to select the firm that represents the best value to the SANITATION DISTRICT; and

**WHEREAS**, throughout the selection process, CONTRACTOR demonstrated that it has the products, engineering, and delivery capabilities to perform the Work; and

**WHEREAS**, CONTRACTOR was selected to perform the Work under this Agreement based on the best-value selection process described in the RFQ and RFP;

**WHEREAS**, capitalized terms used in this Agreement and not defined herein shall have the same meanings assigned to them in the RFQ, RFP, General Conditions, Specifications, and other documents referenced herein and, in the event of conflict, the order of precedence in section 7.7 herein shall apply.

**NOW, THEREFORE**, in consideration of the promises, covenants, and agreements hereinafter set forth, the parties hereby agree to be bound by the terms and conditions of this Agreement, including documents attached to the Agreement and documents referenced or articulated as part of the Agreement, and hereby further agree as follows:

## **ARTICLE I SCOPE OF SERVICES**

### **1.1 Scope of Services**

#### **A. General**

The SANITATION DISTRICT will retain CONTRACTOR to replace the SANITATION DISTRICT’s current SCADA Platform with a modern standardized SCADA Platform that will meet the SANITATION DISTRICT’s current and future needs, expand with the SANITATION DISTRICT’s Capital Improvement Program (“CIP”), serve to enhance the

operation and maintenance of the SANITATION DISTRICT's assets, maintain and improve operational efficiencies, and mitigate risk across the SANITATION DISTRICT's enterprise. Under this Agreement, the SANITATION DISTRICT will issue task orders to CONTRACTOR for the purchase of goods and services for the new SCADA Platform.

CONTRACTOR shall:

1. Supply hardware and software, including, but not limited to, engineering workstations, operator workstations, process controllers, simulation devices, networking equipment, historians, and servers/clients;
2. Grant all licenses needed to utilize the supplied hardware and software; and
3. Provide services related to the SCADA Platform, including, but not limited to, project management, engineering, graphics programming, system configuration, testing, commissioning, system administration, system updates, support services, training, and custom integration services.

#### B. Work Locations

1. All on-site project management, engineering, integration, and services work shall be performed at the SANITATION DISTRICT's facilities, including, but not limited to, the following:
  - a. Plant No. 1 located at 10844 Ellis Avenue, Fountain Valley, CA 92708;
  - b. Plant No. 2 located at 22212 Brookhurst Street, Huntington Beach, CA 92646;
  - c. The 15 off-site lift/pump stations listed in Exhibit "1";
  - d. The staging site as detailed in Section 01505, Mobilization of the Project J-120 Scope of Work; and
  - e. Other facilities which the SANITATION DISTRICT may construct, acquire, and/or operate during the term of this Agreement.
2. Manufacturing, assembling, programming, and testing CONTRACTOR's product-line components may be performed at CONTRACTOR's facilities and delivered to the SANITATION DISTRICT's facilities. In addition, programming of applications such as process graphics, controller code, reports, and the like, may be performed in CONTRACTOR's facilities so long as the development of the engineering requirements (to ensure accurate definition of the Work prior to its production), bench testing, and commissioning are performed at the SANITATION DISTRICT's facilities through meetings and workshops.

#### C. Delivery of Work and Work Scope

1. Without exception, all Work completed and accomplished by this Agreement shall be based on individual written task orders ("Task Orders") developed exclusively by the SANITATION DISTRICT. Should the terms of this Agreement conflict with

the terms or requirements of the Task Order, the terms of this Agreement shall prevail. Detailed descriptions of Task Order Types and the Task Order Procedure are included below.

2. To initiate this Agreement, the SANITATION DISTRICT has developed the following Task Order:

Task Order #1 (Type 2 Task Order) shall be the implementation of the Project J-120 Scope of Work. The Project J-120 Scope of Work includes the design and delivery of a new enterprise-wide SCADA Platform for the SANITATION DISTRICT's two treatment facilities, off-site lift/pump stations, and the Santa Ana River Interceptor collections system based on CONTRACTOR's proposed SCADA Platform. The specific requirements are more specifically described in the Scope of Work for Project J-120 attached hereto as Exhibit 2. The cost of the Project J-120 Task Order shall be a lump sum, fixed price, unless the SANITATION DISTRICT requires changes to the plans.

3. All future Task Orders will be released to CONTRACTOR as they are developed by the SANITATION DISTRICT. CONTRACTOR hereby agrees to perform all Work identified in future Task Orders, as described below, for new projects as a sole-source provider for the SANITATION DISTRICT, CIP Contractors (defined below), and Other Contractors (defined below) in order to design, implement, and integrate the SCADA Platform elements into the SANITATION DISTRICT's facilities.

#### D. Key Requirements

1. Performance Growth and Licensing

This Agreement demands CONTRACTOR provide the SANITATION DISTRICT a high-performance, high-availability, feature-rich, extensible, and expandable SCADA Platform through a series of Task Orders, with Task Order #1, Project J-120, being the first "project-based" task order in the series. Specification Section 17440, Performance, Growth, and Licensing, included in the Specifications herein, shall apply to all Task Orders of any type and shall take precedence over any and all other documents or materials except for this Agreement.

2. Additional Requirements

As CONTRACTOR's direct product line and technology improve, at the sole direction of the SANITATION DISTRICT and at no additional cost to the SANITATION DISTRICT, CONTRACTOR shall assist the SANITATION DISTRICT to update applicable specifications, including, but not limited to, the specifications listed below, to provide greater performance, additional features, and greater capacity.

- a. 17040 SCADA ICS Network
- b. 17050 SCADA Servers
- c. 17405 Control Panels



- d. 17406 PLC & Controller Hardware
- e. 17425 SCADA Workstations
- f. 17435 Facility Historian
- g. 17440 Performance, Growth, and Licensing

## 1.2 Task Order Procedure

- A. All Work under this Agreement shall be initiated by the SANITATION DISTRICT through a Task Order presented to CONTRACTOR. Each Task Order will contain a scope of work; schedules; defined deliverables; specifications; associated liquidated damages, if applicable; and special provisions specific to the Task Order. Each Task Order will also specify CONTRACTOR' s products, third-party supplied equipment, configuration and integration services, startup services, and other deliverables required to complete the Work in the Task Order.
- B. Upon receipt of a Task Order from the SANITATION DISTRICT, CONTRACTOR shall develop and submit to the SANITATION DISTRICT a Task Order Proposal strictly adhering to the terms and conditions of this Agreement, unless otherwise dictated by the Task Order. Each Task Order Proposal shall include a narrative scope of services, material(s) buildup, detailed cost estimate, schedule-of-values, and Critical Path Method Schedule ("CPM Schedule") detailing all Work required by the Task Order. The scope of services shall include all anticipated Work activities that are necessary for the successful completion of each task requested by the SANITATION DISTRICT.
- C. The SANITATION DISTRICT will review each Task Order Proposal, provide comments, and, if the SANITATION DISTRICT believes it to be reasonably necessary, negotiate with CONTRACTOR regarding the Work. CONTRACTOR shall thereafter submit a final Task Order Proposal for written approval by the SANITATION DISTRICT.
- D. Once a Task Order is approved, CONTRACTOR shall submit the required sureties. CONTRACTOR shall begin the Work described in a Task Order only after receiving a written Notice to Proceed for the Task Order ("Task Order NTP") from the SANITATION DISTRICT. Prior to the issuance of the Task Order NTP, CONTRACTOR shall comply with all applicable laws, rules, regulations, ordinances, and directives.
- E. Upon CONTRACTOR's successful completion of the Work, the SANITATION DISTRICT will issue a Task Order Statement of Completion; release retention, bonding requirements, and other commercial liabilities of CONTRACTOR; and initiate the Warranty period, if applicable.

## 1.3 Task Order Types

The SANITATION DISTRICT will issue the following types of Task Orders:

A. Type 1 Task Order (Product and Services Task Order)

Type 1 Task Orders may contain system hardware, product and commercial-off-the shelf software, and an allocation of hourly services. Generally, this type of Task Order will be issued when the SANITATION DISTRICT will require equipment and/or staff augmentation to perform work with the SANITATION DISTRICT's internal forces.

B. Type 2 Task Order (Project-based Task Order)

1. Type 2 Task Orders may contain system hardware, product and commercial-off-the shelf software, and services to achieve a specific outcome and meet requirements in the Task Order scope of work. Generally, this type of Task Order will be issued when the scope of work is developed by the SANITATION DISTRICT and assigned to CONTRACTOR for implementation.

2. General requirements of Type 2 Task Order

- a. Complete field verification, design, engineering, fabrication, system integration, bench testing, procurement, installation of non-field-side equipment and software, commissioning, documentation, management, ancillary services, training, warranties, maintenance, upgrades as specifically described in the Scope of Work for the applicable Task Order, and any other services and equipment necessary to create and install a fully-functional, feature-rich SCADA platform that meets all the Task Order's requirements.
- b. Provide all labor, materials, equipment, transportation, tools, consumables, project management, engineering/design, procurement, project scheduling, project controls, coordination with and assistance to the project engineer regarding work performed by others, construction services, startup and testing services, equipment delivery, documentation services, and ongoing management and support services that are necessary to meet all the Task Order's requirements.
- c. Integrate the Task Order Work into the SCADA Platform and with the SANITATION DISTRICT's system, including existing and future facilities, in order to meet the requirements of said Task Order.
- d. Coordinate the integration of the SCADA Platform at future construction projects that have a SCADA Platform component.

C. Type 3 Task Order (Project-based Task Order Assigned to Other Contractors)

1. Type 3 Task Orders will allow the SANITATION DISTRICT to develop pricing, scope of work, and schedule for CIP project's contract documents with construction contractors ("CIP Contractors") for the construction of CIP projects or to assign the Task Order to other contractors ("Other Contractors") performing work for the SANITATION DISTRICT. Generally, this type of Task Order will be issued to provide field-side hardware and/or services.

## 2. General requirements of Type 3 Task Order

- a. Complete field verification, design, engineering fabrication, system integration, bench testing, procurement, installation of non-field-side equipment, shipping, commissioning, documentation, certification of proper installation, certification of proper operation, management, ancillary services, training, and warranties, as more specifically described in the Scope of Work for the applicable Task Order, and any other services and equipment the SANITATION DISTRICT finds necessary to create and deliver a fully-functional, feature-rich SCADA Platform that meets the Task Order's requirements.
- b. Provide all labor, materials, equipment, transportation, tools, consumables, project management, engineering/design, procurement, project scheduling, project controls, coordination with and assistance to the CIP Contractors or Other Contractors, testing services, equipment delivery, and documentation services.
- c. Integrate the Task Order Work into the SCADA Platform and with the SANITATION DISTRICT's system and existing and future facilities to meet the requirements of said Task Order.
- d. Deliver the SCADA Platform to CIP Contractors or Other Contractors, consistent with the Task Order, for future construction projects that have a SCADA Platform component.

All Task Orders shall strictly follow the pricing requirements specified in Article III of this Agreement.

### 1.4 Task Order Administration

- A. For Type 1 Task Orders and Type 2 Task Orders, CONTRACTOR shall perform the Work at the direction of the SANITATION DISTRICT's designated representative. The SANITATION DISTRICT's designated representative will communicate with CONTRACTOR on all matters related to the administration of the Task Order and CONTRACTOR's performance of the Task Order Work. The SANITATION DISTRICT is the task administrator for these task orders.
- B. Type 3 Task Orders Work shall be negotiated by the SANITATION DISTRICT and assigned to the CIP Contractors or Other Contractors for administration and management. Such CIP Contractors or Other Contractors shall communicate with CONTRACTOR on all matters related to the administration of the Task Order and CONTRACTOR's performance of the Task Order work unless otherwise specified in the Task Order.

### 1.5 Modification of Scope of Services

Without invalidating this Agreement, the SANITATION DISTRICT may, at any time, modify any Task Order by altering, adding to, or deducting from the services to be performed. All such changes shall be in writing. If any such changes cause an increase or decrease in CONTRACTOR's cost of, or the time required for, the performance of any of the services, CONTRACTOR shall immediately notify the SANITATION DISTRICT consistent with the

requirements specified in the General Conditions. If the SANITATION DISTRICT deems it appropriate in its sole discretion, the SANITATION DISTRICT may make an equitable adjustment to CONTRACTOR's compensation based on modification of a Task Order, provided that any adjustment must be approved by both parties in writing and must be consistent with the Unit Price provisions and the General Conditions.

## **1.6 Written Authorization**

Prior to performing any services in connection with the Task Orders, CONTRACTOR shall obtain from the SANITATION DISTRICT a written authorization to proceed as specified in this Article and throughout this Agreement. Further, throughout the term of this Agreement, CONTRACTOR shall immediately advise the SANITATION DISTRICT, in writing, of any anticipated need to modify any Task Order, including, but not limited to, any changes to the time for completion or the compensation and pricing sheet. CONTRACTOR shall obtain the SANITATION DISTRICT's written consent to the change prior to proceeding with any changes. In no event shall the SANITATION DISTRICT's consent be construed to relieve CONTRACTOR from its duty to render all services in accordance with applicable laws, rules, regulations, accepted industry standards, or the terms of this Agreement.

## **1.7 Key Personnel**

CONTRACTOR's "Key Personnel" for the Work to be performed under this Agreement shall include, but not be limited to, project manager, project engineer, and integration leader. Such Key Personnel shall be available for the term of the Agreement. No person designated as Key Personnel shall be removed or replaced without prior written consent of the SANITATION DISTRICT, which consent shall not be unreasonably withheld, provided that the replacement personnel have equivalent or higher required experience and qualifications. At its sole discretion, the SANITATION DISTRICT may require CONTRACTOR to submit qualifications and experience of the replacement personnel and may require a formal interview of such personnel prior to replacement approval. If the SANITATION DISTRICT requires CONTRACTOR to remove a person designated as Key Personnel, CONTRACTOR shall agree to do so immediately regardless of the reason or the lack of reason.

## **1.8 Confidentiality and Non-disclosure**

The Non-disclosure Agreement CONTRACTOR signed during the proposal phase, attached hereto as Exhibit "3," shall continue in full force and effect for the term of the Agreement.

## **1.9 Final Inspection, Completion, and Acceptance of all Work under the Agreement and/or Task Order**

### **A. Final Inspection**

CONTRACTOR shall notify the ENGINEER, in writing, when all punch list items for all the Work under the Agreement and/or each applicable Task Order have been completed, all Work is completed in accordance with the Contract Documents, and all

clean-up has been completed. Clean-up shall be completed when all waste, materials, excess materials, tools, and equipment related to the applicable Task Order are removed from the SANITATION DISTRICT's facilities. The ENGINEER will thereafter make a Final Inspection for the purpose of ascertaining that the Work has been fully completed in accordance with the requirements of the Contract Documents.

#### B. Final Completion

The ENGINEER shall certify, in writing, the full completion of the Work, including the date of completion after the ENGINEER has made the Final Inspection and is satisfied that the Work has been completed in accordance with the Contract Documents, including all punch list items, and is satisfied that all submittals have been made and accepted, including, but not limited to, all materials required by the Contract Documents and all As-Builts, Record Drawings by CONTRACTOR, if required by the Agreement and/or Task Order, and any other required record documents have been completed and accepted; all Change Order Work has been completed and accepted by the ENGINEER; and all other requirements of the Contract Documents, except for any unexecuted Change Orders and possible future warranty and guarantee Work, have been accomplished.

#### C. Final Acceptance

The Work, after achieving Final Completion, is subject to Final Acceptance by the SANITATION DISTRICT. Final Acceptance is defined herein as the "action taken by the SANITATION DISTRICT accepting the Work as fully completed after certification by the ENGINEER," and occurs in accordance with the following:

1. CONTRACTOR is required to provide adequate resources to fully support the Agreement and/or Task Order close-out efforts identified in the Contract Documents including, but not limited to, execution of all Change Orders, agreement on all final quantities and all other activities specified herein titled "Final Completion," "Final Acceptance," and "Final Payment." Such support and completion of all administrative close-out activities as required herein must be provided within the timeframe(s) requested by the SANITATION DISTRICT and is a condition precedent to Final Acceptance.
2. After certifying the date of Final Completion of the Agreement and/or Task Order, the ENGINEER shall make a final estimate of the amount of Work performed thereunder and the General Manager or designee shall certify, as specified in the SANITATION DISTRICT Delegation of Authority, as amended, ("designated authority") the value of such Work and the date of Final Completion. If the designated authority finds that the Work has been completed according to the Contract Documents, the designated authority shall establish the date of Final Acceptance and find and declare the Work accepted pursuant to this section, which shall be evidenced by a Notice of Completion.
3. Only upon Final Acceptance shall Final Payment be processed. Processing of Final Payment shall occur in accordance with the provisions herein titled "Final Completion" and "Final Acceptance." Final Completion and Final Acceptance are for purposes of issuing Final Payment and neither shall act to relieve CONTRACTOR from any of its obligations under the Contract Documents and

under no circumstances shall Final Acceptance of the Agreement and/or Task Order Work waive any rights related to any claims that may be asserted by the SANITATION DISTRICT under this Agreement or California law pertaining to warranties and guarantees, latent defects, indemnity, fraud on the part of CONTRACTOR, gross mistakes on the part of CONTRACTOR amounting to fraud, or any breach of the Contract Documents.

## 1.10 Warranty

- A. Warranties shall be applied on a Task Order basis. CONTRACTOR shall warrant all the provisions below for a period of one (1) year after Final Acceptance for Task Order. However, the requirements specified in Specification Section 17440, Performance, Growth, and Licensing, and other applicable specifications, shall be in effect for the entire term of the Agreement and shall supersede all warranties specified below.

### 1. System Warranty

CONTRACTOR warrants that, for the term of the Agreement, the system will meet the functional, performance, and reliability specifications and requirements as defined in this Agreement and/or applicable Task Orders. The system and/or each of its subsystems, components, and interfaces will be capable of operating fully and correctly in conjunction with the system hardware and the requirements of the applicable Task Order. CONTRACTOR warrants that for the term of this Agreement and/or for one (1) year after the acceptance of the applicable Task Order Work, as applicable, the system will perform as required in the Agreement and/or applicable Task Orders. In the event the system does not meet these warranties, CONTRACTOR shall, within seven (7) days of its discovery by CONTRACTOR or the SANITATION DISTRICT, remedy the defect and provide, at no cost to the SANITATION DISTRICT, the necessary software, hardware, and/or services required to attain the levels or standards contained in the warranties of the Agreement and warranties of the applicable Task Orders.

### 2. Software Warranties

CONTRACTOR warrants that it owns or otherwise has the right to license CONTRACTOR's product software and any third-party software required for CONTRACTOR's product suite to the SANITATION DISTRICT and that CONTRACTOR possesses all rights and interests necessary to enter into this Agreement. CONTRACTOR shall maintain such warranties for the term of the Agreement. In addition, CONTRACTOR warrants that, during the term of the Agreement:

- a. All product software and application software (software work product developed exclusively under this Agreement) licensed or provided under this Agreement will be free of known defects, viruses, worms, and trojan horses.
- b. CONTRACTOR's product software and application software will meet or exceed the functional, performance, and reliability specifications and requirements herein or in the applicable Task Order.
- c. These warranties will be in addition to other warranties in Article VI herein.

3. Work Quality Warranty

CONTRACTOR warrants that, for the term of the Agreement, all work performed by CONTRACTOR and/or its Subconsultants and Subcontractors of any tier under this Agreement will conform to best industry practices and will be performed in a professional and workmanlike manner by staff with the necessary training, skills, experience, and knowledge to do so.

4. Regulatory Warranty

CONTRACTOR warrants that, for the term of this Agreement, the system will comply with all processing and reporting requirements for all Federal, State, and local laws and regulations. If the software requires updating due to a change in a Federal, State, or local law or regulation affecting the SANITATION DISTRICT, CONTRACTOR will provide these changes per a mutually-agreed-to schedule at no additional cost to the SANITATION DISTRICT. Notwithstanding this provision, in no event shall CONTRACTOR provide said update later than the date required by the Federal, State, or local law or regulation affecting the SANITATION DISTRICT. In the event the SANITATION DISTRICT is notified of a change in Federal, State, or local law or regulations that requires updating the software, the SANITATION DISTRICT will notify CONTRACTOR of that change as soon as reasonably possible.

5. Documentation Warranty

CONTRACTOR warrants that, for the term of this Agreement, the documentation for all of CONTRACTOR's licensed product software and application software will be complete and accurate in all material respects. CONTRACTOR shall revise the documentation to reflect all updates of product software and application software provided by CONTRACTOR under this Agreement. This includes documentation on any product software and application software modification or configuration changes made to the system by CONTRACTOR during the installation process.

B. In the event of failure to comply with the above-mentioned conditions within one (1) week after being notified in writing, the SANITATION DISTRICT is hereby authorized to proceed to have the defects remedied at the expense of CONTRACTOR who hereby agrees to pay the cost and charges thereof immediately on demand. CONTRACTOR's warranty shall continue as to any corrected deficiency until the later of:

1. The remainder of the original one-year warranty period; or
2. One year after the SANITATION DISTRICT's acceptance of the corrected Work.

Such action by the SANITATION DISTRICT will not relieve CONTRACTOR of the warranties required by this section or elsewhere in the Contract Documents.

C. If, in the opinion of the SANITATION DISTRICT, defective Work is detected during the warranty period which creates a dangerous condition or requires immediate correction or modification to prevent further loss to the SANITATION DISTRICT or to prevent interruption of the SANITATION DISTRICT operations, the SANITATION DISTRICT will attempt to give the notice required by this section. If CONTRACTOR cannot be

contacted or does not comply with the SANITATION DISTRICT's request for correction within a reasonable time as determined by the SANITATION DISTRICT, the SANITATION DISTRICT may, notwithstanding the provisions of this section, proceed to make such correction or provide such modification. The costs of such correction or modification shall be charged against CONTRACTOR. Such action by the SANITATION DISTRICT will not relieve CONTRACTOR of the warranties required by this section or elsewhere in the Contract Documents.

- D. This section does not in any way limit the warranty on any items for which a longer warranty is specified or on any items for which a manufacturer or Supplier gives a warranty for a longer period. CONTRACTOR agrees to act as a co-guarantor with such manufacturer or Supplier and shall furnish the SANITATION DISTRICT all appropriate guarantee or warranty certificates upon completion of the Project and acceptance by the SANITATION DISTRICT. No warranty period, whether provided for in this section or elsewhere, shall in any way limit the liability of CONTRACTOR, Sureties or insurers.

## **ARTICLE II DURATION OF AGREEMENT AND SPECIAL TERMS**

### **2.1 Term of Agreement**

The Agreement shall be effective for fifteen (15) years after the date of its signing by the SANITATION DISTRICT. Upon written agreement of the parties, the Agreement may be extended for additional terms in one (1) to five (5) year increments for a maximum aggregate term of twenty-five (25) years.

### **2.2 Notification of Delay**

CONTRACTOR shall immediately notify the SANITATION DISTRICT, in writing, if CONTRACTOR experiences or anticipates experiencing a delay in performing the Work within the time frame set forth in any Task Order. The written notice shall include an explanation of the cause for, and a reasonable estimate of the length of, the delay.

### **2.3 Liquidated Damages**

A. CONTRACTOR shall complete all or any designated portion of the Work called for under the Agreement and/or Task Order in all parts and requirements within the time set forth in the Contract Documents. For the duration of each Task Order, CONTRACTOR shall furnish the ENGINEER a monthly statement showing the following:

1. Number of days originally specified for completion,
2. Number of days charged to date,
3. Number of days of time extensions approved,
4. Number of days remaining to completion, and
5. Revised date for completion.



- B. If at any time CONTRACTOR's Critical Path Work progress falls behind schedule, the SANITATION DISTRICT reserves the right to require CONTRACTOR to accelerate the Work to bring the Task Order back on schedule. Such acceleration cost shall be at CONTRACTOR's sole expense.
- C. Failure of CONTRACTOR to perform any covenant or condition contained in the Contract Documents within the time period specified shall constitute a material breach of this Agreement entitling the SANITATION DISTRICT to terminate CONTRACTOR's performance under the Agreement unless CONTRACTOR applies for, and receives, an extension of time in accordance with the procedures set forth in the General Conditions. Such termination shall be in addition to any and all other remedies available to the SANITATION DISTRICT by law, in equity, or pursuant to the provisions of this Agreement.
- D. Failure of the SANITATION DISTRICT to insist upon the performance of any covenant or condition within the time period specified in the Agreement shall not constitute a waiver of CONTRACTOR's duty to complete performance within the designated period unless the waiver is in writing.
- E. The SANITATION DISTRICT's agreement to waive a specific time provision or to extend the time for performance shall not constitute a waiver of any other time provisions contained in the Contract Documents. Failure of CONTRACTOR to complete performance promptly within the additional time authorized in the waiver or extension of time agreement shall constitute a material breach of this Agreement entitling the SANITATION DISTRICT to terminate CONTRACTOR's performance under the Agreement and to any and all other legal or equitable remedies.
- F. CONTRACTOR shall not be assessed Liquidated Damages nor the cost of engineering and inspection during any delay in the completion of the Work caused by acts of God, acts of a public enemy, acts of public utilities, delays caused by failure of a public agency or owner of a utility to provide for removal or relocation of existing main or trunkline utility facilities or other known utility facilities, fire, floods, earthquake, epidemic, quarantine restrictions, strikes, and unusually severe weather, or delays necessarily resulting from war or national or local emergencies, or delays of Subcontractors and Subconsultants due to such causes; provided that CONTRACTOR shall, within fifteen (15) days from the beginning of any such delay, request an extension of time in accordance with the procedures set forth in this section and as specified in the General Conditions. Such delays shall not entitle CONTRACTOR to any additional compensation. CONTRACTOR's sole remedy shall be to seek an extension of time. This provision shall not apply to, and CONTRACTOR shall not be entitled to an extension of time for, a delay caused by the acts or omissions of CONTRACTOR. The SANITATION DISTRICT shall ascertain the facts and the extent of the delay and its findings of the facts thereon shall be final and conclusive.
- G. In the event CONTRACTOR fails to achieve Final Completion of the Work for the Agreement and/or Task Order within the period of performance or fails to meet any other time requirements set forth in the Agreement and/or Task Order, including any designated milestones, after due allowance for extensions of time made in accordance with the Contract Documents, if any, the SANITATION DISTRICT will sustain damage which would be extremely difficult and impracticable to ascertain. The parties

therefore agree that CONTRACTOR will pay to the SANITATION DISTRICT as Liquidated Damages, and not as a penalty, a **daily sum specified in the individual Task Order** for each and every calendar day during which Final Completion of the Agreement and/or Task Order is so delayed and for each day CONTRACTOR fails to achieve any designated milestone as set forth in the Agreement and/or Task Order. CONTRACTOR agrees to promptly pay such Liquidated Damages and further agrees that SANITATION DISTRICT may offset the amount of Liquidated Damages from any monies due or that may become due CONTRACTOR under this Agreement. CONTRACTOR also agrees that to the extent the amount of Liquidated Damages exceeds any monies due CONTRACTOR under this Agreement, CONTRACTOR shall promptly pay all such amounts to the SANITATION DISTRICT upon demand.

## 2.4 Right to Suspend for Convenience

At the SANITATION DISTRICT's sole option, for its convenience, and at no cost to the SANITATION DISTRICT, the SANITATION DISTRICT may suspend all or any portion of CONTRACTOR's performance of this Agreement for a reasonable period of time not to exceed six (6) months. In accordance with the provisions of this Agreement, the SANITATION DISTRICT will give written notice to CONTRACTOR of such suspension. In the event of such a suspension, the SANITATION DISTRICT shall pay to CONTRACTOR a sum equivalent to the reasonable value of the Work that CONTRACTOR has performed up to the date of suspension. Thereafter, the SANITATION DISTRICT may rescind such suspension by giving written notice of rescission to CONTRACTOR. The SANITATION DISTRICT may then require CONTRACTOR to resume performance of the Work in compliance with the terms and conditions of this Agreement; provided, however, that CONTRACTOR shall be entitled to an extension of time equal to the length of the suspension, unless otherwise agreed to in writing by the parties.

## 2.5 Temporary Suspension of Work

- A. The ENGINEER shall have the authority to suspend the Work, wholly or in part, for such period as deemed necessary due to unsuitable weather, or to such other conditions as are considered unfavorable for the suitable prosecution of the Work, or for such time as deemed necessary due to the failure on the part of CONTRACTOR to carry out instructions given or to perform any provision of the Agreement. CONTRACTOR shall immediately comply with the written order of the ENGINEER to suspend the Work wholly or in part. The suspended Work shall be resumed when conditions are favorable and methods are corrected, as ordered by the ENGINEER.
- B. If a suspension of Work is ordered by the ENGINEER due to the failure on the part of CONTRACTOR to carry out orders given or to perform any provision of the Agreement, CONTRACTOR shall bear all costs associated with the suspension of Work and no extension of time for the completion of the Work shall be granted.
- C. If a suspension of Work is ordered by the ENGINEER due to unsuitable weather or to such other conditions as are considered unfavorable for the suitable prosecution of the Work, CONTRACTOR shall be entitled to an extension of time equal to the length of the suspension and 15 calendar days considered as the time necessary to resume performance of the Work when applicable, unless otherwise agreed to in writing by the parties.

## 2.6 Termination for Convenience

- A. The SANITATION DISTRICT may terminate CONTRACTOR's performance under the Agreement, in whole or in part, for any reason or no reason, at the SANITATION DISTRICT's sole and absolute discretion; or when conditions encountered during the Work make it impossible or impracticable to proceed; or when the SANITATION DISTRICT is prevented from proceeding with the Agreement by an act of God, by law, or by official action of a public authority; or upon a determination that such termination is in the best interest and convenience of the SANITATION DISTRICT; or when the SANITATION DISTRICT is prohibited from completing the Work for any reason.
- B. The SANITATION DISTRICT shall provide no less than ten (10) days written notice of its intent to terminate for convenience and shall provide CONTRACTOR with consultation with the SANITATION DISTRICT prior to termination.
- C. Upon receipt of such written notice of termination, CONTRACTOR shall:
1. Stop Work as specified in the written notice;
  2. Terminate all orders and Subcontractors and Subconsultants except as necessary to complete Work which is not terminated;
  3. If directed in writing by the SANITATION DISTRICT to do so, assign all right, title, and interest in subcontracts and materials in progress, in which case the SANITATION DISTRICT will have the right, at its discretion, to settle or pay any or all claims arising out of the termination of such Subcontractors and Subconsultants, but in no event shall recovery by any contractor include lost profits for uncompleted portions of Work;
  4. Deliver or otherwise make available to the SANITATION DISTRICT all data, Drawings, Specifications, reports, estimates, summaries and such other information and material as may have been accumulated by CONTRACTOR in performing the Agreement whether completed or in process;
  5. Settle outstanding liabilities and claims with approval of the SANITATION DISTRICT;
  6. Complete performance of such part of the Work as has not been terminated; and
  7. Take such other actions as may be necessary, or as may be directed by the SANITATION DISTRICT for the protection and preservation of the Work and/or property related to the Agreement.
- D. Upon receipt of the SANITATION DISTRICT's written notice of termination for convenience, and within a period of thirty (30) days, as determined by the ENGINEER at the time of termination, CONTRACTOR shall submit to the ENGINEER a Termination Proposal which shall include, but not be limited to: CONTRACTOR's estimated costs to be incurred by CONTRACTOR as a result of the termination for convenience as allowed by the Contract Documents, including all documentation to support such costs; the status of the Work at time of termination; the status of termination of CONTRACTOR's agreements with Subcontractors, Subconsultants, and Suppliers, including the amount of each said agreement, amount paid under each

agreement up to the date of termination, and the amount that currently remains due and owing under each agreement for Work completed as of the date of termination, if any; a list, certified as to quantity and quality, of termination inventory not previously disposed of, excluding items authorized for disposition by the ENGINEER; and any other information and/or documentation as required by the SANITATION DISTRICT.

- E. Upon receipt of the SANITATION DISTRICT's written notice of termination for convenience, CONTRACTOR shall submit to the ENGINEER a request for Final Payment, pursuant to the requirements set forth herein. Such request shall be submitted promptly, but no later than thirty (30) days from the effective date of termination.
- F. The Final Payment to CONTRACTOR after termination for convenience shall be limited to amounts due and owing under the Agreement at the time of termination, including the following:
  - 1. Any actual costs incurred by CONTRACTOR for restocking charges;
  - 2. The agreed upon price of protecting the Work in any manner, if any, as directed by the SANITATION DISTRICT;
  - 3. The cost of settling and paying claims arising out of the termination of the Work under Subcontractor and/or Subconsultant agreements or orders with the SANITATION DISTRICT's approval, as specified above, exclusive of the amounts paid or payable on account of goods delivered or Work furnished by Subcontractor or Subconsultant prior to the effective date of the termination; and
  - 4. The Task Order Price allocable to the portion of the Work properly performed or goods supplied by CONTRACTOR as of the date of termination, as determined in accordance with the provision herein entitled Payment – General reduced by any sums previously paid to CONTRACTOR.
- G. The SANITATION DISTRICT shall have the right to withhold any portion or the whole of the Final Payment under this provision in the event there are any outstanding claims for compensation asserted by the SANITATION DISTRICT against CONTRACTOR or by any third party against the SANITATION DISTRICT which arises out of CONTRACTOR's Work.

## **2.7 Termination of a Portion of the Work**

- A. If the termination is only for a portion of the Work, the compensation amount shall be reduced by the amount applicable to the portion of the Work which is terminated, including overhead and profit. The SANITATION DISTRICT shall, in its sole discretion, select the basis of reduction based on one of the following:
  - 1. Unit Prices specified in the Agreement.
  - 2. A lump sum determined by the SANITATION DISTRICT based on the estimate costs, including overhead and profit, of the terminated portion of the Work.

B. If the termination is only for a portion of the Work, the SANITATION DISTRICT reserves its right to continue with CONTRACTOR's products, items, and/or components with a SANITATION DISTRICT delivery team, including consultants to the SANITATION DISTRICT. As a condition of this partial termination, CONTRACTOR shall:

1. For the duration of the original term of the Agreement, provide its products, items, and components at the Unit Price specified in the Agreement. However, any product, item, or component in CONTRACTOR's product line NOT in the Unit Price of the Agreement shall be provided at either (a) 10% above its unburdened cost (i.e., exclusive of all profit, markups, overheads, or other CONTRACTOR's direct costs) or (b) 50% of its published list price.

The SANITATION DISTRICT shall have the exclusive and sole right to choose the method of compensation from the above methods that best serves the SANITATION DISTRICT. This shall include the most current, future, and previous versions of all products, items, and components delivered, to be delivered for the Work of this Agreement, and their entire product line related to the Work of the Agreement. Pricing provided by CONTRACTOR under this provision shall be subject to a full audit by the SANITATION DISTRICT or a third party of the SANITATION DISTRICT's choice.

2. Provide the SANITATION DISTRICT, as evidence of proper pricing, CONTRACTOR's pricing for such products, items, and components on CONTRACTOR's most current relevant projects and/or properly published list price schedule.
3. Provide the SANITATION DISTRICT updates to said pricing every 24 months.
4. Provide all training required by the SANITATION DISTRICT at a 40% discount of CONTRACTOR's published list price.

## **2.8 Termination for Default**

A. CONTRACTOR shall be considered in default of this Agreement if CONTRACTOR (1) refuses to provide a Task Order Proposal, negotiate the Task Order Proposal in good faith, or execute the Task Order, so long as the Work of the Task Order is relevant and consistent with the Scope of Work under the Agreement; (2) refuses or fails to prosecute the Work or any separable part thereof with such diligence as will ensure its completion within the time specified herein or any authorized extension thereof; (3) fails to perform the Work in a manner required by the Contract Documents and/or industry standards; (4) fails to complete such Work within such time as required under the Contract Documents; (5) if CONTRACTOR should be adjudged as bankrupt or is otherwise deemed insolvent by the SANITATION DISTRICT based on good cause and is unable to proceed with the Work; (6) if CONTRACTOR should make a general assignment for the benefit of creditors; (7) if a receiver should be appointed on account of insolvency; (8) if the CONTRACTOR files a petition to take advantage of any debtor's act; (9) should any Subcontractor or Subconsultant violate any of the provisions of the Agreement; (10) if CONTRACTOR should persistently or repeatedly refuse or fail, except in cases for which an authorized extension of time is provided, to supply enough properly skilled personnel or proper materials to complete the Work in the time specified; (11) if CONTRACTOR should fail to make prompt payment to

Subcontractors and/or Subconsultants for material or labor; (12) if CONTRACTOR should persistently disregard laws or instructions given by the SANITATION DISTRICT; or (13) if CONTRACTOR otherwise substantially fails to fulfill its obligations under the Contract Documents. In the event CONTRACTOR is in default of this Agreement, the SANITATION DISTRICT may, without prejudice to any other right or remedy available under federal, state, or local law, serve written notice upon CONTRACTOR and Sureties of the SANITATION DISTRICT's intention to terminate CONTRACTOR's performance under the Agreement. Said notice shall contain the reasons for such intention to terminate CONTRACTOR's performance under the Agreement and, unless within ten (10) days after the service of such notice such violations cease and/or satisfactory arrangements for the corrections thereof have been made, the SANITATION DISTRICT may terminate CONTRACTOR's performance under the Agreement.

- B. In the event of any such termination, the SANITATION DISTRICT shall serve written notice thereof upon the Surety and CONTRACTOR and the Surety shall have the right to take over and perform the Agreement. However, if the Surety, within five (5) days after the service of a notice of termination, does not give the SANITATION DISTRICT written notice of its intention to take over and perform the Agreement or if the Surety serves such notice of its intent to take over and perform the Agreement and does not begin performance thereof within fifteen (15) days from the date of serving said notice, the SANITATION DISTRICT may take over the Work and prosecute the same to completion by contract or by any other method it may deem advisable. In the event the SANITATION DISTRICT exercises its rights under this provision, all Work shall be at the sole expense of CONTRACTOR and the Sureties and/or CONTRACTOR shall be liable to the SANITATION DISTRICT for any excess cost or other damage incurred by the SANITATION DISTRICT thereby. In such an event, the SANITATION DISTRICT may, without liability for so doing, take possession of and utilize such materials, licenses, tools, equipment, supplies, and other property belonging to CONTRACTOR, including use of CONTRACTOR and/or third-party intellectual property, and/or assume assignment of any and all subcontracts for Subcontractors, Subconsultants, and/or Suppliers that may be on the worksite and be necessary to complete the Work. For any portion of such Work that the SANITATION DISTRICT elects to complete by furnishing its own employees, materials, tools, and equipment, the SANITATION DISTRICT shall be compensated in accordance with the schedule of compensation for force account work as stated in the General Conditions.
- C. If the Surety assumes CONTRACTOR's terminated Work, the Surety shall take CONTRACTOR's place in all respects for that part of the Work and shall be paid by the SANITATION DISTRICT for all Work performed by it in accordance with the terms of the Contract Documents. If the Surety assumes the Agreement, all money due CONTRACTOR at the time of its default shall be payable to the Surety as the Work progresses, subject to the terms of the Agreement.
- D. CONTRACTOR hereby consents to assigning to the SANITATION DISTRICT and/or the SANITATION DISTRICT's replacement contractor all subcontracts and other agreements of any and all Subcontractors, Subconsultants, and/or Suppliers that may be on the worksite and/or may be necessary to complete the Work in the event of Termination for Default or Termination for Convenience, as set forth above. CONTRACTOR agrees to obtain, by way of a subcontract provision, the consent of

each and every Subcontractor, Subconsultant, and/or Supplier for such assignment prior to the commencement of each such Subcontractor's, Subconsultant's, and/or Supplier's Work on the Task Order.

- E. In the event of such termination, CONTRACTOR will be paid the actual amount due based on Unit Prices, the Task Order, and the quantity of Work completed at the time of termination, less damages caused to the SANITATION DISTRICT by acts of CONTRACTOR causing the termination, including, but not limited to, all costs to the SANITATION DISTRICT arising from professional services and attorneys' fees and all costs generated to insure or bond the Work of substituted contractors, subcontractors, or subconsultants utilized to complete the Work. If such costs exceed the unpaid balance, CONTRACTOR shall pay the difference to the SANITATION DISTRICT promptly upon demand. On failure of CONTRACTOR to pay, the Surety shall pay on demand by the SANITATION DISTRICT. Any portion of such difference not paid by CONTRACTOR or Surety within thirty (30) days following the mailing of a demand for such costs shall earn interest at the maximum rate authorized by California law.
- F. On demand or at the termination of the Agreement, whichever occurs first, CONTRACTOR shall return to the SANITATION DISTRICT all property of the SANITATION DISTRICT in the possession or control of CONTRACTOR. CONTRACTOR shall also deliver to the SANITATION DISTRICT all work product currently in existence and for which the SANITATION DISTRICT has made payment.
- G. Upon termination or expiration of this Agreement, CONTRACTOR will cooperate with the SANITATION DISTRICT to assist with the orderly transfer of services, functions, and operations provided by CONTRACTOR under this Agreement to another provider or to the SANITATION DISTRICT as determined by the SANITATION DISTRICT in its sole discretion. Prior to the termination or expiration of this Agreement, the SANITATION DISTRICT may require CONTRACTOR to perform certain transition services that the SANITATION DISTRICT deems necessary to migrate CONTRACTOR's work to another provider or to the SANITATION DISTRICT. Transition services may include, but are not limited to, the following:
  - 1. Working with the SANITATION DISTRICT to jointly develop a mutually-agreed-upon transition services plan to facilitate the termination of the services;
  - 2. Notifying all affected vendors, Subcontractors, and Subconsultants;
  - 3. Performing the transition services plan activities;
  - 4. On an as needed basis, answering questions regarding the system or the services performed by CONTRACTOR; and
  - 5. Providing such other reasonable services needed to effectuate an orderly transition.
- H. The foregoing provisions are in addition to and shall not limit any other rights or remedies under law or in equity available to the SANITATION DISTRICT.

## 2.9 Dispute Resolution

- A. In the event of a dispute as to the construction or interpretation of this Agreement or any rights or obligations hereunder, the parties shall first attempt, in good faith, to resolve the dispute by mediation. The parties shall mutually select a mediator to facilitate the resolution of the dispute. I
- B. In the event the parties are unable to timely resolve the dispute through mediation, the issues in dispute shall be submitted to arbitration pursuant to California Code of Civil Procedure, Part 3, Title 9, sections 1280 et seq. For such purpose, an agreed arbitrator shall be selected, or, in the absence of agreement, each party shall select an arbitrator and those two (2) arbitrators shall select a third arbitrator who shall arbitrate the dispute. Discovery may be conducted in connection with the arbitration proceeding pursuant to California Code of Civil Procedure Section 1283.05. The arbitrator shall take such evidence and make such investigation as deemed appropriate and shall render a written decision on the matter in question. The arbitrator shall decide all disputes in accordance with the laws of the State of California. The arbitrator's decision and award shall be subject to review for errors of fact or law in the Superior Court for the County of Orange with a right of appeal from any judgment issued therein.

## 2.10 Responsibility for Loss, Damage, or Injury

Neither the SANITATION DISTRICT, nor its Directors, officers, employees or agents shall be held responsible in any manner for any of the following: any loss or damage that may happen to the Work or any part thereof during the performance of the Agreement; any loss or damage to any of the materials, equipment, supplies, or other things used or employed in performing the Work; injury to or death of any person, either workers or the public; or damage to property, from any cause that might have been prevented by CONTRACTOR, CONTRACTOR's workers, or anyone employed by CONTRACTOR.

## 2.11 Non-Liability of the SANITATION DISTRICT's Officers and Employees

No director, officer, employee, or agent of the SANITATION DISTRICT shall be personally responsible for any liability arising under or by virtue of the Agreement.

## ARTICLE III PRICING AND COMPENSATION

### 3.1 Unit Prices

- A. Unit prices, as specified in Exhibit 4, ("Unit Prices") shall remain in full effect for the term of the Agreement, except as specified in section G, below. ALL UNIT PRICES SHALL BE FULLY-BURDENED PURSUANT TO THE TERMS AND CONDITIONS OF THIS AGREEMENT.
- B. Each Unit Price shall include:
  - 1. All direct and indirect costs necessary for CONTRACTOR to deliver one unit of the specified good or service. Such costs may include, but are not limited to, costs for labor, equipment, and materials; insurance and bonds; field and office staff; onsite



project administration; security; small tools and consumables; incidental job burdens; back-office Information Technology equipment; and testing equipment required for CONTRACTOR to deliver the Work of the associated Unit Price.

- a. Pricing in UP Schedule 1, Hardware Systems & Components, includes materials, labor, and engineering submittals as required by the referenced specification section(s) and any notes as applicable.
  - b. Pricing in UP Schedule 3, Labor Rates, inclusive of raw labor rates, fringe costs, and profit as required by the referenced specification section(s) and any notes as applicable.
  - c. Pricing in UP Schedule 4 – Training, Support & Other Costs, includes materials, labor and engineering submittals as required by the referenced specification section and the course descriptions therein.
2. Field and office staff hourly rates, which includes, but is not limited to, supervision, clerical, and general office support. These hourly rates will be used for negotiating services that are outside of the specific items or tasks identified in the Unit Price Schedules 1, 3, and 4.
  3. Project administration, which includes, but is not limited to, review and coordination, estimating, engineering, scheduling and updating, furnishing record drawings to incorporate changes, and home office salaries and expenses.
  4. Incidental job burdens, which include, but are not limited to, office equipment and supplies, telephone, utilities, safety equipment, warning devices, personal protective equipment, and conformance with the job requirements of the Occupational Safety and Health Administration, if applicable, required to accomplish the Work of the associated Unit Price.
  5. All costs for taxes, tariffs, licenses, storage, parts procurement and delivery Freight or Free on Board (F.O.B.) to the SANITATION DISTRICT's facilities at locations directed by the receiving owner (SANITATION DISTRICT, CONTRACTOR, CIP Contractor, or Other Contractor), project management, design, installation of non-field-side equipment and supervision, related submittals and documentation, testing, bonds, fees, insurance, training, startup, and warranty required for the associated Unit Price.
- C. Unit Prices shall be CONTRACTOR's exclusive basis for pricing Task Orders of all types and any additive or deductive changes to such Task Orders. The Unit Prices for Task Orders shall be locked at the applicable Unit Prices effective on the date the SANITATION DISTRICT accepts CONTRACTOR's Task Order Proposal.
- D. For Type 3 Task Orders, the Unit Prices shall extend to CIP Contractors performing CIP work on the SANITATION DISTRICT's assets/facilities. The SANITATION DISTRICT will develop the Scope of Work for the Type 3 Task Orders. CONTRACTOR shall determine the price for the Work in the Type 3 Task Order by applying the Unit Prices and following the negotiation and approval process of said Task Order. CONTRACTOR shall provide the total cost of the final Type 3 Task Order to the CIP Contractor who will include it in CIP Contractor's bid for the CIP Project

work. CONTRACTOR shall also extend the Unit Prices to the CIP Contractor for any change orders requested by the SANITATION DISTRICT or for change orders requested by the CIP Contractor and approved by the SANITATION DISTRICT.

- E. For Type 3 Task Orders, the Unit Prices shall extend to Other Contractors performing work on the SANITATION DISTRICT's assets/facilities. The SANITATION DISTRICT will develop the Scope of Work for the Type 3 Task Orders. CONTRACTOR shall determine the price for the Work in the Type 3 Task Order by applying the Unit Prices and following the negotiation and approval process for the Work of said Task Order. CONTRACTOR shall provide the total cost of the final Type 3 Task Order to the Other Contractor who will include it in the Other Contractor's bid for the Other Contractor's work. CONTRACTOR shall also extend the Unit Prices to the Other Contractor for any change orders requested by the SANITATION DISTRICT or for change orders requested by the Other Contractor and approved by the SANITATION DISTRICT.
- F. The Unit Prices established under this Agreement shall also apply to Work a CIP Contractor and Other Contractor may request as part of the bidding process with CONTRACTOR that is beyond the Type 3 Task Order Scope of Work negotiated between the SANITATION DISTRICT and CONTRACTOR or for any work that a CIP Contractor or Other Contractor performs for the SANITATION DISTRICT that does not have a Task Order.
- G. Unit Prices shall be adjusted in accordance with the commonly-published annual indices identified below after a five (5) year price guarantee from the effective date of the Agreement or the completion of Project J-120, whichever is later. Thereafter, Unit Prices may be adjusted every two (2) years and shall remain in effect for a two (2) year term. All adjustments shall only consider changes based on the lower of: (1) the percent difference of the annual increase/decrease for the immediate prior two years as reported in the indices below, or (2) the percent change in CONTRACTOR's list price provided by CONTRACTOR with evidence of proper pricing as required in subsection L below. The selection of which method to use shall be at the sole discretion of the SANITATION DISTRICT.

Provided that the indices are available, valid, and representative of the market segment/conditions, the following annual indices shall be used to calculate price adjustments under this provision:

- 1. Engineering/Professional and Field Services – Mercer Global Compensation Planning Report
  - 2. Equipment/Hardware/Software – Producer Price Index for Process Control
- H. For any extension of the term of this Agreement or as part of the adjustment process following the aforementioned price guarantees, the SANITATION DISTRICT, at its sole discretion, shall have the right to maintain the Unit Prices as specified in the Agreement or the Unit Prices current at that time if a mutually-agreed-upon change to Unit Prices cannot be reached. Unit Prices shall be the basis for all price proposals herein, all new Work in the Agreement, and any changes in said Work, whether additive or deductive. Any mistakes or other differences in Unit Prices or price proposals shall be resolved to the benefit of the SANITATION DISTRICT.

- I. Any Work in a Task Order of any type, inclusive of components, equipment, devices, or software, not included in the Unit Prices, but included in CONTRACTOR's product line, shall be (i) subject to a fifty percent (50%) multiplier from CONTRACTOR's published list price or (ii) the price CONTRACTOR charges to a client similar to the SANITATION DISTRICT, whichever is lower.
- J. In the event that market conditions have, in the SANITATION DISTRICT's sole judgment, rendered certain products, items, components, or services operationally undesirable, inadequate, or obsolete, the SANITATION DISTRICT reserves the right to compel CONTRACTOR to replace them with new state-of-the-art and most current products, items, components, or services at the Unit Price specified in the Unit Price schedules in effect at that time or CONTRACTOR's current product price, whichever is lower.
- K. For any products, items, components, or services contained in the Unit Price schedules that are native to CONTRACTOR's product lines, inclusive of third-party products or Original Equipment Manufacturer products integrated into the product line or services provided by a Subcontractor, Subconsultant, or Supplier, CONTRACTOR shall offer and provide such product, item, component, or service as if it is its "own" product, item, component, or service and fully license, warrant, and guarantee the performance of the product, item, component, or service.
- L. At any time during the term of the Agreement, the SANITATION DISTRICT reserves the exclusive right to require CONTRACTOR to submit, as evidence of proper pricing, its prices of such products, items, components, or services on their most current relevant executed projects and, if such prices are lower than the Unit Prices under this Agreement, reduce the Unit Prices to match the prices in such other projects. CONTRACTOR shall, at all times, provide such evidence during the price escalation process.
- M. Upon the SANITATION DISTRICT's execution of Type 2 and Type 3 Task Orders or change to Type 2 or Type 3 Task Orders, the Unit Price buildup will revert to a lump sum price proposal for that Work in the Task Order.

### **3.2 Compensation**

- A. Each Task Order will require CONTRACTOR to provide a time-based compensation schedule consistent with CONTRACTOR's CPM Schedule in addition to the Unit Price schedules consistent with the requirements in the Task Order. The SANITATION DISTRICT will approve the compensation schedule as part of the Task Order process and compensate CONTRACTOR accordingly.
- B. The SANITATION DISTRICT agrees to pay, and CONTRACTOR agrees to accept, as full consideration for the faithful performance of the Work, subject to any additions or deductions as provided in approved Change Orders, the sum specified in each approved Task Order.
- C. Payments shall be made on payment applications accompanied by a certificate signed by the ENGINEER stating that the Work for which payment is demanded has been performed in accordance with the terms of the Contract Documents and that the amount stated in the certificate is due under the terms of the Agreement. Payment

applications shall also be accompanied with all documentation, records, and releases as required by the Agreement, Unit Prices and/or payment milestones per the Task Order, and General Conditions. The Total amount of Progress Payments shall not exceed the actual value of the Work completed as certified by the ENGINEER. The processing of payments shall not be considered an acceptance of any part of the Work.

D. As used in this section, the following terms shall have the following meanings:

1. "Net Progress Payment" means a sum equal to the Progress Payment less the Retention Amount and other qualified deductions identified in this Agreement, the applicable Task Order, or other Contract Documents (Liquidated Damages, stop payment notices, etc.).
2. "Progress Payment" means a sum equal to:
  - a. the value of the actual Work completed since the commencement of the Work as determined by the SANITATION DISTRICT;
  - b. less all previous Net Progress Payments;
  - c. less all amounts of previously qualified deductions;
  - d. less all amounts previously retained as Retention Amounts.
3. "Retention Amount" for each Progress Payment means the percentage of each Progress Payment to be retained by the SANITATION DISTRICT to assure satisfactory completion of the Agreement and/or Task Order. The amount to be retained from each Progress Payment shall be determined as specified below.

E. Payment – General

1. Progress Payments will be based on an approved detailed breakdown of the Task Order Price, which shall be furnished by CONTRACTOR showing Unit Prices and quantities, and adequate invoices for services. CONTRACTOR's payment application shall be organized pursuant to CONTRACTOR's itemized breakdown of the Unit Prices, which shall be prepared and submitted to the ENGINEER in the time and manner more particularly specified herein in the section entitled Payment – Itemized Breakdown of Task Order Price, appropriately itemized as described therein.
2. Items shown in the detailed Itemized Breakdown of the Task Order Price as unit costs will be included in the Progress Payments based on the percentage completed for any particular item. Progress Payment applications shall be accompanied by revised progress CPM Schedule, as specified in the Contract Documents.
3. Each Progress Payment application shall show each Subcontractor, Subconsultant, and Supplier participating in the Work completed during the previous Progress Payment period and the dollar amount of such participation. Each Progress Payment application shall be accompanied by:

- a. A conditional waiver and release upon progress payment pursuant to Civil Code Section 8132 for each Subcontractor, Subconsultant, and Supplier participating in the Work completed during the previous Progress Payment period, which shall be in an amount no less than the dollar amount of such participation;
  - b. A conditional waiver and release upon progress payment pursuant to Civil Code Section 8132 on behalf of CONTRACTOR which shall be in an amount no less than the dollar amount of the total requested in the Progress Payment application; and
  - c. Completed Progress Payment Form, supplied by the SANITATION DISTRICT, which includes a payment certification by CONTRACTOR certifying that the Work for which payment is requested has been accomplished.
4. CONTRACTOR shall thereafter, within twenty (20) days of receipt of the payment from the SANITATION DISTRICT, complete (1) an unconditional waiver and release upon progress payment pursuant to Civil Code Section 8134 for each Subcontractor, Subconsultant, and Supplier participating in the Work completed during the previous Progress Payment period, and (2) an unconditional waiver and release upon progress payment pursuant to Civil Code Section 8134 on behalf of CONTRACTOR in an amount no less than the amount received from the SANITATION DISTRICT. CONTRACTOR shall submit such unconditional waivers and releases with CONTRACTOR's subsequent Progress Payment application.

F. Payment – Application for Payment

1. CONTRACTOR shall submit payment applications to the SANITATION DISTRICT addressed as follows:

Orange County Sanitation District  
10844 Ellis Avenue  
Fountain Valley, CA 92708-7018  
Attention: Resident Engineer (Project and/or Task Order No. \_\_\_\_\_)

2. Payment terms shall be net 30 days from receipt of properly submitted, complete payment application. CONTRACTOR's payment application shall include, at a minimum:
  - a. Clear reference to the SANITATION DISTRICT's Project and/or Task Order number as well as the SANITATION DISTRICT's Project and/or Task Order title and Project Manager to which the payment application applies.
  - b. CONTRACTOR's payment application number, payment application date, as well as the contract payment number the invoice represents. For example, CONTRACTOR's submittal of its first payment application is payment number 1, its second payment application submittal is payment number 2, and so on. Any CONTRACTOR re-submittal/revision to a submitted payment application shall have a letter suffix (a, b, c, etc.) added to the payment number signifying the payment application revision. For example, CONTRACTOR's first re-submittal of its first payment application shall be designated as payment for number "1a".

- c. Clear reference to the payment schedule item(s) being invoiced and the appropriate milestone description of activities and/or Work related to the billing.
- d. The itemized and total amount being invoiced (in U.S. dollars), less the amount of all contractual retention and deductions applicable for the invoiced amount (in U.S. dollars), and the resulting total net payment due.
- e. The time period during which the Work was performed and for which the payment application is submitted.

G. Payment – Mobilization Payment Requirements

Unless the SANITATION DISTRICT specifically includes mobilization as a Task Order Proposal item in the Schedule of Prices, CONTRACTOR shall not receive an initial progress payment for mobilization and full compensation for any necessary mobilization required shall be considered as included in the prices paid for all of the various items of Work under the Contract Documents and no additional compensation shall be allowed therefore. To the extent mobilization is included by the SANITATION DISTRICT as a line item in the Schedule of Prices and the mobilization amount is provided by the SANITATION DISTRICT, CONTRACTOR shall be entitled to an initial progress payment in the amount provided by the SANITATION DISTRICT upon the completion of all mobilization items as specifically delineated in the Mobilization Specification for the applicable Task Order. If CONTRACTOR is requested to provide the mobilization amount in the Schedule of Prices, CONTRACTOR shall be allowed to invoice and be paid for its mobilization costs as specified in the Mobilization Specification for the applicable Task Order.

H. Payment – Itemized Breakdown of Task Order Price

1. Within thirty (30) days of the Task Order NTP for each Task Order, CONTRACTOR shall submit an itemized breakdown of all lump sum Task Order Proposal items for the ENGINEER's approval and subsequent use for progress estimates and for determining Progress Payments. The itemized breakdown shall include only those items of Work that can be specifically identified with the Work of improvement and shall not include the following such items unless specifically included as a Task Order Proposal item by the SANITATION DISTRICT in the Schedule of Prices for the applicable Task Order:
  - a. Mobilization/Move-in
  - b. Field Offices
  - c. Bond Costs
  - d. Insurance Costs
2. The cost breakdown shall be consistent with the Work items and dollar values used by the ENGINEER in preparing monthly estimates. The special form shall include columns for Item, Cost, Percent of Total Cost, Percent Completed

Previous Period, Percent Completed for Period, Percent Completed to Date, and Percent of Contract Completed. Form of breakdown shall be subject to the ENGINEER's review.

- I. If CONTRACTOR fails or refuses to comply with the requirements set forth in this section, CONTRACTOR shall not be deemed to have provided the required data and shall not be entitled to progress payments unless and until it has provided the required information and data set forth herein.

J. Suspension of Payments

If after written notice to CONTRACTOR of deficiencies in Work; failure to comply with this Agreement; failure to comply with the quality, schedule, and Work requirements of the Task Order; or failure to revise and keep current with the Project and/or Task Order Schedule, the ENGINEER recommends that all or a portion of payments due or to become due under the Agreement be suspended until CONTRACTOR corrects any such deficiency. The ENGINEER may suspend said payments until such deficiencies are corrected.

K. The SANITATION DISTRICT's Right to Withhold Certain Amounts and Make Application Thereof

1. In addition to the amount which the SANITATION DISTRICT may retain as Retention, the SANITATION DISTRICT may withhold a sufficient amount or amounts from any payment otherwise due to CONTRACTOR as in its judgment may be necessary to cover any of the following:
  - a. Payments which may be past due and payable for properly filed claims against CONTRACTOR or any of its Subconsultants and/or Subcontractors for labor or materials furnished in or about the performance of the Work under the Agreement.
  - b. Estimated or actual costs for correcting defective Work not remedied.
  - c. Amounts claimed by the SANITATION DISTRICT as forfeiture due to delays or other offsets to the Agreement and/or Task Order completion caused by CONTRACTOR as set forth in this Agreement, the Task Order, or other Contract Documents.
2. The SANITATION DISTRICT may contact CONTRACTOR's Surety and make it aware of the Agreement and/or Task Order deficiencies, delays, and other Agreement and/or Task Order non-conformance.
3. The SANITATION DISTRICT may apply such withheld amount or amounts to the payment of such claims at its discretion. In so doing, the SANITATION DISTRICT shall be deemed the agent of CONTRACTOR and any payments so made by the SANITATION DISTRICT shall be considered as a payment made under the Agreement by the SANITATION DISTRICT to CONTRACTOR and the SANITATION DISTRICT shall not be liable to CONTRACTOR for such payment made in good faith. Such payments may be made without prior judicial determination of the claim or claims. The SANITATION DISTRICT will render to CONTRACTOR a proper accounting of such funds disbursed on behalf of CONTRACTOR.

### **3.3 Retained Funds; Substitution of Securities**

- A. From each Progress Payment, the SANITATION DISTRICT shall retain ten percent (10%) of the first fifty percent (50%) of the total value of each Task Order, as adjusted by Change Orders, as the Retention Amount to assure satisfactory completion of the Agreement and/or Task Order. The cumulative amount retained as Retention Amounts shall be retained by the SANITATION DISTRICT until the Final Payment and shall not exceed ten percent (10%) of the Task Order Price, as adjusted by Change Orders.
- B. To ensure performance under the Contract Documents, CONTRACTOR may, at its sole expense, substitute securities equivalent to the retention withheld by the SANITATION DISTRICT. Such securities shall be deposited with an escrow agent approved by the SANITATION DISTRICT who shall then pay such retention to CONTRACTOR. Upon satisfactory completion of the Work, the securities shall be returned to CONTRACTOR. CONTRACTOR shall be the beneficial owner of any security substituted for monies withheld and shall receive any accrued interest thereon. Securities eligible for investment shall include those listed in Government Code section 16430, bank or savings and loan certificates of deposit, interest bearing demand deposit accounts, standby letters of credit, or any other security mutually agreed to by CONTRACTOR and the SANITATION DISTRICT. No such substitution shall be accepted until the escrow agreement, securities, and any other documents related to the substitution are executed by CONTRACTOR and reviewed and accepted in writing by the SANITATION DISTRICT.

### **3.4 Final Payment**

- A. CONTRACTOR shall, prior to Final Acceptance, prepare and submit an application for Final Payment to the SANITATION DISTRICT in the manner required by the SANITATION DISTRICT.
- B. The Final Payment, including retention, shall not be due and payable until satisfaction of the following conditions: the SANITATION DISTRICT has issued a Final Acceptance for the Task Order as set forth herein; the SANITATION DISTRICT's receipt of all documentation, records, and releases as required by the Agreement and executed by CONTRACTOR; and the expiration of thirty-five (35) days from the date of the SANITATION DISTRICT's recordation of Notice of Completion, if applicable.
- C. If CONTRACTOR fails to complete the Work as specified in the Contract Documents and if the unpaid balance of the Task Order Price exceeds the direct and indirect costs of completing the Task Order, including, but not limited to, all costs necessary to insure or bond the Work of substituted contractors, subconsultants, or subcontractors utilized to complete the Work, such excess shall be paid to CONTRACTOR. If such costs exceed the unpaid balance, CONTRACTOR shall pay the difference to the SANITATION DISTRICT promptly upon demand. On failure of CONTRACTOR to pay, the Surety shall pay on demand by the SANITATION DISTRICT. Any portion of such difference not paid by CONTRACTOR or Surety within thirty (30) days following the mailing of a demand for such costs by the SANITATION DISTRICT shall earn interest at the maximum rate authorized by California law.



- D. It is mutually agreed between the parties to the Agreement that no certificate given or payment made under the Agreement shall be conclusive evidence of performance of the Agreement and/or Task Order and no payment shall be construed to be an acceptance of any defective Work or improper materials.
- E. CONTRACTOR further agrees that the payment of the final amount due under the Agreement and/or Task Order and the adjustments and payments for any Work done in accordance with any alterations of the same shall release the SANITATION DISTRICT and its directors, officers, employees, and agents from any and all claims or liability on account of Work performed under the Agreement and/or Task Order or any alteration thereof.

## **ARTICLE IV CONTRACTOR RESPONSIBILITIES**

### **4.1 Use of Standards**

CONTRACTOR shall be responsible for the adequacy of its own Work and that of all Subcontractors and Subconsultants under contract to CONTRACTOR for this Agreement. Where approval by the SANITATION DISTRICT or other representatives of the SANITATION DISTRICT is required, it is understood to be conceptual approval only and does not relieve CONTRACTOR of any of the following: the CONTRACTOR's responsibility of complying with all laws, codes, industry and SANITATION DISTRICT standards; liability for damages caused by errors, omissions, or non-compliance with industry standards; or negligence on the part of CONTRACTOR or its Subcontractors and Subconsultants. CONTRACTOR expressly agrees that the services to be provided under this Agreement shall be performed in accordance with the standards customarily provided by an experienced and competent professional organization rendering the same or similar services. CONTRACTOR shall, without additional compensation, correct or revise any errors or deficiencies in its services or products in accordance with all agreed-upon warranties.

### **4.2 Licenses**

CONTRACTOR represents and warrants to the SANITATION DISTRICT that it has obtained all licenses legally required to engage in this Work and/or that it will subcontract portions of the Work to organizations that possess the proper licenses to perform the Work.

### **4.3 Permits**

CONTRACTOR represents and warrants to the SANITATION DISTRICT that, if required by the Task Order, it will obtain all permits, qualifications, and approvals of whatever nature that are legally required to perform the Work of the Task Order. Any and all fees required by Federal, State, County, City, and/or municipal laws, codes, and/or tariffs that pertain to Work to be performed under a Task Order will be paid by CONTRACTOR.

### **4.4 Office Space and Staging Area**

If required by the Task Order, the SANITATION DISTRICT will provide CONTRACTOR an on-premises area which can be used for office space and staging area. CONTRACTOR,

however, shall be responsible for all business infrastructure for such area, including, but not limited to, office furniture, computer systems and software, internet connection, and phone service, as necessary. CONTRACTOR shall use this staging area only to perform services for the SANITATION DISTRICT.

#### **4.5 Applicable Laws and Regulations**

CONTRACTOR shall, at its own cost and expense, comply with all applicable Federal, State, and local laws, rules, and regulations and hereby agrees to indemnify and hold the SANITATION DISTRICT harmless from any and all damages and liabilities assessed against the SANITATION DISTRICT as a result of CONTRACTOR's noncompliance. Any item or provision required to be included herein under any applicable law, rule, or regulation shall be deemed included as a part of this Agreement regardless of whether such item or provision is specifically identified herein.

#### **4.6 Familiarity with Work**

By executing this Agreement, CONTRACTOR warrants that: (1) it has investigated the Work to be performed; (2) it has investigated the sites of the Work and is aware of all conditions there; (3) it understands the facilities, difficulties, and restrictions of the Work under this Agreement; (4) it warrants that the SANITATION DISTRICT has provided answers to all CONTRACTOR's questions and provided CONTRACTOR adequate time and access to evaluate the facilities; and (5) it warrants that CONTRACTOR had all the information necessary to provide a complete proposal. Should CONTRACTOR discover any latent or unknown conditions materially differing from those inherent in the Work, through future Task Orders or as represented by the SANITATION DISTRICT, it shall immediately inform the SANITATION DISTRICT of those conditions and shall not proceed, except at CONTRACTOR's sole risk, until written instructions are received from the SANITATION DISTRICT.

#### **4.7 Submittals and Shop Drawings**

All submittals and design-based drawings shall be reviewed and stamped by a California Registered Engineer qualified to review and approve such submittals and/or shop drawings.

#### **4.8 Environmental Compliance**

Without limiting the foregoing, CONTRACTOR shall, at its own cost and expense, comply with all Federal, State, and local environmental laws, regulations, and policies which apply to CONTRACTOR, its Subcontractors and Subconsultants, or the Work to be performed under the Agreement.

#### **4.9 Safety Standards and Human Resources Policies**

While working at the SANITATION DISTRICT's facilities, CONTRACTOR and its Subcontractors and Subconsultants shall follow and ensure their employees follow all Federal, State, and local regulations as well as the SANITATION DISTRICT's Safety Standards attached hereto as Exhibit "5" and the Human Resources Policies accessible through the following link: <https://www.ocsd.com/about-us/transparency/safety-and-human-resources-policy/-folder-632>. If there is a conflict between (i) the SANITATION

DISTRICT's Safety Standards and/or Human Resources Policies and (ii) Federal, State, or local laws and regulations, CONTRACTOR shall, at its own cost and expense, follow the most stringent applicable requirement. CONTRACTOR shall promptly notify the SANITATION DISTRICT of any such conflict upon discovery.

#### **4.10 Damage to the SANITATION DISTRICT's Property**

Any of the SANITATION DISTRICT's property damaged by CONTRACTOR or Subconsultants and Subcontractors shall be repaired or replaced by the CONTRACTOR at the SANITATION DISTRICT's discretion and at no cost to the SANITATION DISTRICT.

#### **4.11 F.O.B. Destination**

CONTRACTOR shall assume full responsibility for all transportation, transportation scheduling, packing, handling, insurance, and other services associated with delivery of all products deemed necessary under this Agreement or any Task Order issued pursuant to this Agreement.

#### **4.12 Audits**

During the term of the Agreement and for a period of three (3) years after termination of the Agreement, CONTRACTOR shall give the SANITATION DISTRICT access to examine any pertinent books, documents, and records of CONTRACTOR relating to this Agreement, including, but not limited to, materials relating to Unit Prices, product-based prices, and all services performed under this Agreement.

#### **4.13 Escrow Agreement**

CONTRACTOR shall deposit into escrow the required intellectual property documents and materials as specified in the Escrow Agreement attached hereto as Exhibit "6."

#### **4.14 No Solicitation of Employees**

During the term of this Agreement and for a period of one (1) year immediately following termination of this Agreement, or any extension hereof, CONTRACTOR shall not call on, solicit, or hire any SANITATION DISTRICT employees about whom CONTRACTOR became aware as a result of CONTRACTOR's Work for the SANITATION DISTRICT. If CONTRACTOR violates this provision, CONTRACTOR will pay the SANITATION DISTRICT fifty percent (50%) of the former employee's annual salary which payment is in addition to any other rights and remedies that may be available to the SANITATION DISTRICT.

#### **4.15 Conflict of Interest and Reporting**

- A. CONTRACTOR shall, at all times, avoid any conflict of interest or appearance of any conflict of interest in performance of this Agreement.
- B. CONTRACTOR affirms that to the best of its knowledge, there exists no actual or potential conflict between CONTRACTOR's families, business, or financial interest and the Work to be performed under this Agreement. In the event of a change in either its

private interests or Work under this Agreement, CONTRACTOR shall discuss with the SANITATION DISTRICT any questions regarding possible conflicts of interest which may arise as a result of such change.

#### **4.16 Changes in Control of CONTRACTOR**

- A. CONTRACTOR shall notify the SANITATION DISTRICT within ten (10) days of the occurrence of a change in control of the operation or ownership of CONTRACTOR. As used in this section, "control" is defined as the possession, direct or indirect, of either:
  - 1. The ownership or ability to direct the voting of fifty-one percent (51%) or more of the equity interests, value, or voting power in CONTRACTOR; or
  - 2. The power to direct or cause the direction of CONTRACTOR's management and policies, whether through ownership of voting securities, by contract, or otherwise.
- B. In the event of a change in control of CONTRACTOR, the SANITATION DISTRICT shall have the option of terminating this Agreement by written notice to CONTRACTOR.

#### **4.17 Right to Review Work, Facilities, and Records**

- A. The SANITATION DISTRICT reserves the right to review any portion of the Work performed by CONTRACTOR and its Subcontractors or Subconsultants under this Agreement and CONTRACTOR hereby agrees to cooperate with the SANITATION DISTRICT to the greatest extent possible.
- B. CONTRACTOR shall furnish to the SANITATION DISTRICT such reports, statistical data, and other information pertaining to CONTRACTOR's Work under the Agreement as shall be reasonably required by the SANITATION DISTRICT to carry out its rights and responsibilities under any of its agreements relating to the Work performed under this Agreement.
- C. The SANITATION DISTRICT's right to review or approve drawings, specifications, procedures, instructions, reports, test results, calculations, schedules, or other data developed by CONTRACTOR shall not relieve CONTRACTOR of any of its obligations herein.

#### **4.18 Work Requirements**

All required Work for the Project, including, but not limited to, programming, project management, programming standards, specifications updates, and design drawings must be performed in the United States. By signing this Agreement, CONTRACTOR certifies that all labor categories, including engineers, that perform Work on the Project will comply with all applicable laws and regulations to work in the United States.

#### **4.19 Protection of documents and information**

CONTRACTOR shall not disclose or share any physical document, electronic media of any type, or verbal information related to the RFP, including, but not limited to, the RFP

and its attachments, addenda, product(s) of the Work itself, and any information shared by the SANITATION DISTRICT during the prosecution of the Work itself with any foreign country without the prior written consent of the SANITATION DISTRICT.

**ARTICLE V**  
**INSURANCE, BONDS, INDEMNIFICATION, AND LIMITATION OF LIABILITY**

**5.1 Insurance**

A. General Requirements

1. CONTRACTOR, Subcontractors, and Subconsultants shall purchase and maintain, throughout the term of this Agreement and any periods of warranty or extensions, insurance against claims for injuries to persons or damages to property which may arise from or in connection with the performance of the Work hereunder and the results of that Work by CONTRACTOR, its agents, representatives, employees, Subcontractors, and Subconsultants in amounts equal to the requirements set forth below.
2. CONTRACTOR shall not commence Work under this Agreement until all required insurance is obtained in a form acceptable to the SANITATION DISTRICT nor shall CONTRACTOR allow any Subcontractors or Subconsultants to commence any Work until all insurance required of the Subcontractors or Subconsultants has been obtained. Failure to maintain required insurance coverage shall result in termination of this Agreement or stoppage of Work at CONTRACTOR's sole cost and without additional time.
3. Insurance coverage shall be issued and underwritten by insurance companies acceptable to the SANITATION DISTRICT.
4. CONTRACTOR's insurers must have an "A-" Policyholder's Rating, or better, and Financial Rating of at least Class VIII, or better, in accordance with the most current A.M. Best's Guide Rating. CONTRACTOR shall substitute any insurer whose rating drops below the levels herein specified within twenty (20) days of the SANITATION DISTRICT's written notice to CONTRACTOR.
5. CONTRACTOR shall maintain all of the foregoing insurance coverages in force through the point at which the Work under this Agreement is fully completed and accepted by the SANITATION DISTRICT pursuant to the "Final Completion" and "Final Acceptance" provisions herein. Furthermore, CONTRACTOR shall maintain all of the foregoing insurance coverages in full force and effect throughout the warranty period commencing on the date of Final Acceptance.
6. The SANITATION DISTRICT reserves the right to amend the required limits of insurance commensurate with CONTRACTOR's risk at any time during the term of the Agreement.

## B. Required Insurance Policies

### 1. General Liability

- a. CONTRACTOR shall maintain during the term of the Agreement, including the period of warranty, Commercial General Liability Insurance written on an occurrence basis providing minimum limits of liability coverage of \$10 Million Dollars (\$10,000,000) per occurrence and \$20 Million Dollars (\$20,000,000) aggregate for bodily injury, personal injury, and property damage.
- b. Said insurance shall include coverage for the following hazards: Premises-Operations, blanket contractual liability (for this Agreement), products liability/completed operations (including any product manufactured or assembled), broad form property damage, blanket contractual liability, independent contractors liability, personal and advertising injury, mobile equipment, owners and contractors protective liability, and cross liability and severability of interest clauses.

### 2. Automobile/Vehicle Liability Insurance

- a. CONTRACTOR shall maintain a policy of Automotive Liability Insurance on a comprehensive form covering all owned, non-owned, and hired automobiles, trucks, and other vehicles providing minimum limits of liability coverage of \$5 Million Dollars (\$5,000,000), combined single limit per accident, for bodily injury, personal injury, and property damage.
- b. No vehicles may enter the SANITATION DISTRICT's premises/worksites without possessing the required insurance coverage.

### 3. Worker's Compensation Insurance

CONTRACTOR shall provide such Workers' Compensation Insurance as required by the Labor Code of the State of California in the amount of the statutory limit, including Employer's Liability Insurance with a minimum limit of \$1 Million Dollars (\$1,000,000) per occurrence for bodily injury or disease. Such Worker's Compensation Insurance shall be endorsed to provide for a waiver of subrogation in favor of the SANITATION DISTRICT. A statement on an insurance certificate will not be accepted in lieu of the actual endorsement.

### 4. Errors and Omissions/Professional Liability

- a. CONTRACTOR shall maintain in full force and effect, throughout the term of the Agreement, standard industry form professional negligence errors and omissions insurance coverage in an amount of not less than \$5 Million Dollars (\$5,000,000) and in accordance with the provisions of this Paragraph. If the policy of insurance is written on a "claims made" basis, said policy shall be continued in full force and effect at all times during the term of the Agreement and for a period of five (5) years from the date of the completion of the services thereunder.

- b. In the event of termination of said policy during this period, CONTRACTOR shall obtain continuing insurance coverage for the prior acts or omissions of CONTRACTOR during the course of performing services under the Agreement. Said coverage shall be evidenced by either a new policy evidencing no gap in coverage or by separate extended "tail" coverage with the present or new carrier.
- c. In the event the present policy of insurance is written on an "occurrence" basis, said policy shall be continued in full force and effect during the term of the Agreement or until completion of the services provided for in the Agreement, whichever is later.
- d. CONTRACTOR shall provide to the SANITATION DISTRICT a certificate of insurance in a form acceptable to the SANITATION DISTRICT indicating the deductible and the expiration date of said policy and shall provide renewal certificates not less than ten (10) days prior to the expiration of each policy term.

#### 5. Pollution Liability Insurance

- a. CONTRACTOR shall purchase and maintain insurance for pollution liability covering bodily injury, property damage (including loss of use of damaged property or property that has not been physically injured or destroyed), cleanup costs, and defense costs (including costs and expenses for investigation, defense, or settlement of claims). Coverage shall carry limits of at least \$5 Million Dollars (\$5,000,000) and shall apply to sudden and non-sudden pollution conditions (including sewage spills), both at the site or needed due to migration of pollutants from the site, resulting from the escape or release of smoke, vapors, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants, or pollutants.
- b. The SANITATION DISTRICT, at its sole discretion, shall require CONTRACTOR to increase the minimum insurance coverage required in the prior sub-section if such increase is required by the applicable Task Order.
- c. If CONTRACTOR provides coverage written on a claims-made basis, the SANITATION DISTRICT has the right to approve or reject such coverage in its own discretion. If written on a claims-made basis, CONTRACTOR warrants that any retroactive date applicable to coverage under the policy precedes the effective date of the Agreement and that continuous coverage will be maintained, or an extended discovery period will be exercised, for a period of two years beginning from the time that the Work under the Agreement is completed.

#### C. Proof of Coverage

CONTRACTOR shall furnish the SANITATION DISTRICT with original certificates and amendatory endorsements effecting coverage. Said policies and endorsements shall conform to the requirements stated herein. All certificates and endorsements must be received and approved by the SANITATION DISTRICT before Work commences. The SANITATION DISTRICT reserves the right to, at any time, require complete, certified copies of all required insurance policies, including endorsements, effecting the coverage required. The following are approved forms that must be submitted as proof of coverage:

- Certificate of Insurance ACORD Form 25 (5/2010) or equivalent.
- Commercial General Liability Form CG-0001 10 01
- General Aggregate (ISO Form) CG 25 03 or 25 04
- Additional Insured (General Liability) (ISO Form) CG2010 11 85 or  
The combination of (ISO Forms)  
CG 2010 10 01 and CG 2037 10 01  
  
All other Additional Insured endorsements must be submitted for approval by the SANITATION DISTRICT and the SANITATION DISTRICT may reject alternatives that provide different or less coverage to the SANITATION DISTRICT.
- Additional Insured (Auto Liability) Submit endorsement provided by carrier for the SANITATION DISTRICT approval.
- Waiver of Subrogation State Compensation Insurance Fund Endorsement No. 2570 or equivalent.
- Cancellation Notice State Compensation Insurance Fund Endorsement No. 2065 or equivalent.

D. Subcontractors and Subconsultants

CONTRACTOR shall be responsible for establishing insurance requirements for any Subcontractor and Subconsultant hired by CONTRACTOR. The insurance shall be in amounts and types reasonably sufficient to deal with the risk of loss involving the Subcontractor's and/or Subconsultant's operations and work.

E. Separation of Insured

All liability policies shall contain a "Separation of Insureds" clause.

F. Additional Insured and Primary Insurance Requirement

Each policy of General Liability Insurance, Automobile Liability Insurance, and Pollution Liability Insurance shall be endorsed to contain the following provisions:

1. The SANITATION DISTRICT, its Directors, officers, agents, subcontractors, subconsultants, and employees and all public agencies from whom permits will be obtained, and their Directors, officers, agents, and employees are hereby declared to be additional insureds under the terms of this policy, but only with respect to the operations of CONTRACTOR at or from any of the SANITATION DISTRICT's sites in connection with the Agreement or acts and omissions of the additional insured in connection with its general supervision or inspection of said operations related to the Agreement.



2. Insurance afforded by the additional insured endorsement shall apply as primary insurance and other insurance maintained by the SANITATION DISTRICT shall be excess only and not contributing with insurance provided under this policy.

#### G. Limits Are Minimums

If CONTRACTOR maintains higher limits than any minimums shown above, the SANITATION DISTRICT requires and shall be entitled to coverage for the higher limits maintained by CONTRACTOR.

#### H. Non-Limiting

Nothing in this document shall be construed as limiting in any way nor shall it limit the indemnification provision contained in the Agreement or the extent to which CONTRACTOR may be held responsible for payment of damages to persons or property.

#### I. Defense Costs

Liability policies shall have a provision specifying that defense costs for all insureds and additional insureds are paid in addition to and do not deplete any policy limits.

#### J. Cancellation Notice

Each insurance policy required herein shall be endorsed to state that coverage shall not be cancelled, except after thirty (30) days' prior written notice. The Cancellation Section of ACORD Form 25 (5/2010) shall state the required thirty (30) days' written notification. The policy shall not terminate, nor shall it be cancelled, nor the coverage reduced until thirty (30) days after written notice is given to the SANITATION DISTRICT except for nonpayment of premium, which shall require not less than ten (10) days written notice to the SANITATION DISTRICT. Should there be changes in coverage, CONTRACTOR and its insurance broker/agent shall send to the SANITATION DISTRICT a certified letter which includes a description of the changes in coverage. The certified letter must be sent to the attention of Risk Management, and shall be received by the SANITATION DISTRICT not less than thirty (30) days prior to the effective date of the change(s) if the change would reduce coverage or otherwise reduce or limit the scope of insurance coverage provided to the SANITATION DISTRICT.

## 5.2 Bonds

- A. Prior to the execution of a Type 1 or Type 2 Task Order, CONTRACTOR shall file with the SANITATION DISTRICT Surety bonds satisfactory to the SANITATION DISTRICT for the purpose and in the amounts required herein. Bonds shall be duly executed by a responsible corporate Surety, authorized to issue such bonds in the State of California, and secured through an authorized agent with an office in California. Bonds shall be issued by a Surety who is listed in the latest revision of U.S. Department of Treasury Circular 570, is authorized to issue bonds in California, and whose bonding limitation shown in said circular is sufficient to provide Bonds in the amount required by the Agreement. CONTRACTOR shall pay all Bond premiums, costs, and incidentals.

- B. Each Bond shall be signed by both CONTRACTOR and the Surety and the signature of the authorized agent of the Surety shall be notarized.
- C. Each Bond shall be executed in the name of the Surety insurer under penalty of perjury or the fact of execution of each Bond shall be duly acknowledged before an officer authorized to take and certify acknowledgments and either one of the following conditions shall be satisfied:
1. A copy of the transcript or record of the unrevoked appointment, power of attorney, by-laws, or other instrument duly certified by the proper authority and attested by the seal of the insurer entitling or authorizing the person who executed the Bond to do so for and on behalf of the insurer, is on file in the Office of the County Clerk of the County of Orange; or
  2. A copy of a valid power of attorney is attached to the Bond.
- D. CONTRACTOR shall provide good and sufficient surety bonds for implementation of Task Order as follows: (1) for Type 1 Task Orders, a Payment Bond and (2) for Type 2 Task Orders, a Payment Bond and a Performance Bond. New Bonds shall be acquired and maintained by CONTRACTOR for each Task Order that requires them. The Bonds shall be in full force prior to the issuance of the Task Order NTP for the applicable Task Order and shall be maintained by CONTRACTOR in full force and effect until the expiration of the warranty period of the applicable Task Order, including all extensions thereof as provided by the Contract Documents. At no time shall Work be performed by CONTRACTOR without the proper Bonds required herein.

CONTRACTOR shall present the following Bonds prior to the issuance of the Task Order NTP:

1. "Payment Bond" (Material Bond) shall be for not less than one hundred percent (100%) of the Task Order price to satisfy claims of material suppliers. The bond shall be maintained by CONTRACTOR in full force and effect until the Work of the applicable Task Order is fully accepted by the SANITATION DISTRICT and until all claims for materials are paid. As changes to the Task Order occur via approved Change Orders, CONTRACTOR shall assure that the amount of the Bond is adjusted to maintain 100% of the Task Order price.
2. "Performance Bond" shall be for not less than one hundred percent (100%) of the Task Order price to guaranty faithful performance of all Work, within the time period prescribed, in a manner satisfactory to the SANITATION DISTRICT and to guaranty that all materials and workmanship will be free from original or developed defects and comply with all the requirements of the Agreement and applicable Task Order. The bond shall be maintained by CONTRACTOR in full force and effect until the Work of the applicable Task Order is fully accepted by the SANITATION DISTRICT. This Bond shall also apply to the use of patented articles, materials, or processes and to guarantee the payment of all stop payment notice claimants until Final Acceptance by the SANITATION DISTRICT. As changes to the Task Order occur via approved Change Orders, CONTRACTOR shall assure that the amount of the Bond is adjusted to maintain the 100% of the Task Order price.

- E. For Type 3 Task Orders, CONTRACTOR shall secure bonds as required by law and the CIP Contractor and/or Other Contractor. Compensation for such bonding requirements will not be included in the SANITATION DISTRICT's pre-negotiated Task Order with CONTRACTOR, but will be included in CONTRACTOR's contract with the CIP Contractor.
- F. Should any Surety or Sureties ever be deemed unsatisfactory by the SANITATION DISTRICT, CONTRACTOR shall be notified to that effect and CONTRACTOR shall forthwith substitute a new Surety or Sureties satisfactory to the SANITATION DISTRICT. No further payment shall be deemed due or will be made under such Task Order until the new Sureties shall qualify and be accepted by the SANITATION DISTRICT.

### 5.3 Indemnification

- A. Except for the active negligence or willful misconduct of the SANITATION DISTRICT, CONTRACTOR undertakes and agrees to defend, indemnify, and hold harmless, through legal counsel acceptable to the SANITATION DISTRICT, the SANITATION DISTRICT, and any and all of the SANITATION DISTRICT's Board members, officers, agents, employees, assigns, and successors in interest from and against all third-party suits, causes of action, claims, losses, demands, and expenses, including, but not limited to, attorney's fees, costs of litigation, and any damages or liabilities to third parties of any nature whatsoever, arising out of or related to the performance or nonperformance by CONTRACTOR, or any of CONTRACTOR's Subconsultants, Subcontractors, or suppliers, of any tier, of any portion of the performance of the Work, including, but not limited to, CONTRACTOR's negligent acts, errors, omissions, breach of contract, breach of warranty (express or implied), or willful misconduct.
- B. With respect to all Work covered by or incidental to the Contract Documents, CONTRACTOR shall be responsible for any liability imposed by law and shall indemnify, defend, and hold the SANITATION DISTRICT, ENGINEER, the SANITATION DISTRICT consultants and subconsultants, and all public entities issuing permits to CONTRACTOR (collectively, "Indemnified Parties"), and each of the Indemnified Parties' directors, officers, agents, and employees, free and harmless from and against all of the following:
  - 1. Any claim, suit, or action of every name, kind, and description, loss, damage, cost, expenses, including reasonable attorney's fees and expert fees, costs of compliance with administrative orders and directives, litigation, arbitration, awards, fines, and administratively- or judicially-imposed penalties or judgments arising by reason of death or bodily injury to person(s), injury to property, or other loss, damage, or expense resulting from the performance of the Work, design defects (if design originated by CONTRACTOR only), defects in the Work, or by or on account of acts, errors, or omissions of CONTRACTOR or CONTRACTOR's Subcontractors and Subconsultants, Suppliers, employees, invitees, or agents or from any other cause whatsoever arising during the progress of the Work or at any time prior to its completion and Final Acceptance. Said responsibility shall extend to claims, demands, or liability for loss, damage or injuries occurring or discovered after completion of the Work as well as during the progress of the Work. However, CONTRACTOR shall not be obligated under this Agreement to indemnify the SANITATION DISTRICT, the ENGINEER, or its consultants with respect to the active negligence, sole negligence, or willful misconduct of the SANITATION DISTRICT, the ENGINEER, or its consultants.

2. In any and all claims against the Indemnified Parties by an employee of CONTRACTOR, its Subcontractor, Subconsultant, or Supplier, or anyone directly or indirectly employed by any of them, or anyone for whose acts any of them may be liable, the indemnification obligation as specified herein shall not be limited in any way by the amount or type of damages, compensation, or benefits payable by or for CONTRACTOR, or any Subcontractor, Subconsultant, Supplier, or other person under Workers' Compensation acts, disability benefit acts, or other employee acts.
  3. The obligations of CONTRACTOR as specified herein shall not extend to the liability of the SANITATION DISTRICT's consultants or their subconsultants and each of their directors, officers, agents, and employees arising out of or resulting from or in connection with their preparation of or approval of maps, Drawings, opinions, reports, surveys, designs, or Specifications provided that the foregoing was the sole and exclusive cause of the loss, damage, or injury.
- C. CONTRACTOR shall also be responsible for and shall indemnify, defend, and hold harmless the SANITATION DISTRICT, ENGINEER, SANITATION DISTRICT consultants and their subconsultants, and each of their directors, officers, employees, and agents, from and against all losses, expenses, damages (including damages to the Work itself), attorney's fees, and other costs, including all costs of defense, which any of them may incur with respect to the failure, neglect, or refusal of CONTRACTOR to faithfully perform the Work and all of CONTRACTOR's obligations under the Agreement. Such costs, expenses, and damages shall include all costs, including attorney's fees incurred by the indemnified parties in any lawsuit to which they are a party.
- D. In the event CONTRACTOR or its insurer refuses or fails to provide a legal defense to the SANITATION DISTRICT after receiving written notice of the legal action and a tender and demand for defense, the SANITATION DISTRICT shall have the right to select counsel of its own choice to represent all the interests of the SANITATION DISTRICT at CONTRACTOR's sole cost and expense. CONTRACTOR agrees that the amount of legal costs and expenses, including attorneys' fees, may be withheld by the SANITATION DISTRICT from any amounts due under the Agreement and owing to CONTRACTOR until such time as a final determination is made as to the responsibility for payment of said fees and costs. CONTRACTOR further agrees that to the extent the SANITATION DISTRICT incurs such damages and the damages exceed any remaining amounts due under the Agreement and owing to CONTRACTOR, CONTRACTOR shall reimburse the SANITATION DISTRICT for all such additional damages upon demand by the SANITATION DISTRICT for the same.
- E. The rights and remedies are cumulative of those provided for elsewhere in this Agreement and those allowed under the laws of the United States, the State of California, and the local laws under which the SANITATION DISTRICT operates.

#### **5.4 Joint and Several Liability**

If CONTRACTOR is a joint venture, partnership, or limited liability company, each venturer, partner, or member shall be jointly and severally liable for any and all of the duties and obligations of CONTRACTOR that are assumed under or arise out of the Agreement. Each of such venturer, partner, or member waives notice of the breach or

non-performance of any undertaking or obligation of CONTRACTOR contained in, resulting from, or assumed under the Agreement and the failure to give any such notice shall not affect or impair such venturer's, partner's, or member's joint and several liability hereunder.

## **5.5 Limitation of Liability**

Except for CONTRACTOR's obligations to indemnify and defend the SANITATION DISTRICT for personal injury, bodily injury, or property damage, CONTRACTOR's total liability to the SANITATION DISTRICT arising out of or in connection with this Agreement shall not exceed 300% of the value of each Task Order for Type 2 and Type 3 Task Orders and shall not exceed 100% of the value of each Type 1 Task Order.

## **ARTICLE VI INTELLECTUAL PROPERTY**

### **6.1 Ownership of Work Products**

A. The SANITATION DISTRICT shall own all title, rights, and interests in all Work Products created by CONTRACTOR and its Subcontractors and Subconsultants for the SANITATION DISTRICT under this Agreement. For the purposes hereof, "Work Products" shall include all intellectual property rights, including copyrights, patentable inventions, and other intellectual property rights in all materials, tangible or not, created in whatever medium specifically for the Work of this Agreement, including, without limitation, reports, manuals, specifications, drawings and sketches, computer programs (including, but not limited to, SCADA Platform configuration files, application programming for the field-side hardware, graphic user interface programming, reports, and any other programming development within CONTRACTOR's application and product software to create, configure, and control the SCADA Platform) and source codes for all programs developed for the SANITATION DISTRICT, computer files, databases, schematics, maps, marks, logos, graphic designs, notes, formulas, matters, and combinations thereof (patentable or not), and all forms of intellectual property ("Work Products"). CONTRACTOR shall not dispute or contest, directly or indirectly, the SANITATION DISTRICT's rights and title to the Work Products as described in this Agreement, nor shall CONTRACTOR contest the validity of the intellectual property embodied therein. CONTRACTOR hereby assigns, and if later requested by the SANITATION DISTRICT, shall assign to the SANITATION DISTRICT all title, rights, and interests, tangible or not, in all Work Products. CONTRACTOR shall cooperate, and cause Subcontractors and Subconsultants to cooperate, in perfecting the SANITATION DISTRICT's title, rights, or interests, tangible or not, in any Work Product, including prompt execution of documents as presented by the SANITATION DISTRICT.

CONTRACTOR and its Subcontractors and Subconsultants shall not file for or attempt to assert any ownership, copyright, patent, or trademark on Work Products.

B. If applicable, upon the SANITATION DISTRICT's request, CONTRACTOR agrees to assist the SANITATION DISTRICT, at the SANITATION DISTRICT's expense, in obtaining patents or copyrights for such Work Products, including the disclosure of all pertinent information and data with respect thereto and the execution of all applications, specifications, assignments, and all other instruments and papers which

the SANITATION DISTRICT shall deem necessary to apply for and to assign or convey to the SANITATION DISTRICT, its successors, and assigns the sole and exclusive right, title, and interest in such Work Products. CONTRACTOR agrees to obtain or has obtained written assurances from its employees and contract personnel of their agreement to the terms hereof regarding the Work Products.

## **6.2 Non-disclosure and Notice by Contractor**

- A. As specified in the non-disclosure agreement signed by the parties, CONTRACTOR shall exercise best commercial efforts to guard the SANITATION DISTRICT's Work Products, including intellectual property therein, against and from unauthorized transfer, disclosure, or possession to or by non-SANITATION DISTRICT personnel, unless prior written consent from authorized personnel of the SANITATION DISTRICT is obtained.
- B. In the unlikely event that inventions, discoveries, novel matters, or combination thereof, (collectively "Matters"), whether patentable or not, come to exist or are suspected to exist during the course of CONTRACTOR's performance of this Agreement, CONTRACTOR shall notify the SANITATION DISTRICT promptly without undue delay, shall secure all information pertaining to the Matters, and shall not disclose any information about the Matters to any non-SANITATION DISTRICT personnel.

## **6.3 Obligations of Subconsultants and Subcontractors of any Tier**

CONTRACTOR agrees that before commencement of any subconsultant or subcontract Work it shall incorporate all provisions in this Agreement on intellectual property ownership, including Paragraphs 6.1 and 6.2, of this Article, in CONTRACTOR's agreement with the Subconsultant or Subcontractor to contractually bind or otherwise oblige its Subconsultants and Subcontractors and their personnel performing Work under this Agreement such that the SANITATION DISTRICT's title, rights, and interests in Work Products are preserved and protected as intended herein.

## **6.4 Reservation of Rights and Titles**

All intellectual property, documents, information, and public safety and security plans and materials provided by the SANITATION DISTRICT to CONTRACTOR and its Subconsultants or Subcontractors arising out of or related to this Agreement shall remain the exclusive property of the SANITATION DISTRICT. Nothing herein may be construed to transfer or vest any of the SANITATION DISTRICT's property rights, tangible or not, to CONTRACTOR, any of its Subconsultants or Subcontractors, or any other third party. Outside the scope of its performance under this Agreement, CONTRACTOR may not use, reproduce, distribute, or otherwise make public in any manner, either for profit or not, any of the information, documentation, plans, or procedures developed for or provided by the SANITATION DISTRICT hereunder without the prior written consent and security clearance from authorized personnel of the SANITATION DISTRICT.

## **6.5 License to use pre-existing Intellectual Property**

### **A. License Grant**

CONTRACTOR hereby grants to the SANITATION DISTRICT, its consultants, agents, assigns, and successors in interest a royalty-free, perpetual, non-exclusive, and irrevocable license to use CONTRACTOR's pre-existing intellectual property ("Pre-Existing IP") included, embedded, or embodied in the Work Products delivered under this Agreement. Pre-Existing IP herein shall mean all intellectual property, including, without limitation, patents, copyright, trademarks, trade secrets, and proprietary information that had already been created by CONTRACTOR and/or any third party prior to the commencement of performance under this Agreement and that was not created under this Agreement.

### **B. Third Party License**

CONTRACTOR shall procure and pay for all necessary intellectual property licenses, rights, clearances, and permission (collectively "Licenses") for the SANITATION DISTRICT to use all third-party intellectual property or CONTRACTOR's Pre-Existing IP included, embedded, or embodied in the Work Products to fully enjoy the benefits of this Agreement. The Licenses granted to the SANITATION DISTRICT shall be, at minimum, royalty-free, perpetual, and irrevocable.

### **C. License Agreements**

In the event that a CONTRACTOR's software license agreement is operationally required, the terms for the SANITATION DISTRICT's use of the software shall be detailed in that license; provided, however, to the extent of any conflict or ambiguity between CONTRACTOR's software license agreement and the requirements of this Agreement, the terms of this Agreement shall prevail.

## **6.6 Non-infringement Warranty**

CONTRACTOR represents and warrants that performance of all obligations, including those performed by its Subconsultants or Subcontractors, under this Agreement does not infringe in any way, directly or contributorily, upon any third-party's intellectual property rights, including, without limitation, patents, copyrights, trademarks, trade secrets, and proprietary information.

## **6.7 Intellectual Property Infringement**

### **A. Indemnification**

CONTRACTOR will defend, at its expense, and hold the SANITATION DISTRICT harmless in any infringement claim, demand, proceeding, suit, or action ("Action") against the SANITATION DISTRICT, its Board members, officers, directors, agents, employees, assigns, or successors in interest ("SANITATION DISTRICT Defendants") for any infringement or violation, actual or alleged, direct or contributory, intentional or otherwise, of any intellectual property rights (1) on or in any design, medium, matter, article, process, method, application, equipment, device, instrumentation, software, hardware, or firmware used by CONTRACTOR or its Subconsultants or Subcontractors

of any tier in performing the Work under this Agreement or (2) as a result of the SANITATION DISTRICT's actual or intended use of any Work Products furnished by CONTRACTOR under the Agreement. CONTRACTOR also shall indemnify the SANITATION DISTRICT against all reasonable attorney's fees, losses, costs, expenses, liability, and damages awarded against the SANITATION DISTRICT or settlement award as a consequence of such Action.

**B. Participation in Defense**

In CONTRACTOR's defense of the SANITATION DISTRICT Defendants, negotiation, compromise, and settlement of any such infringement Action, the SANITATION DISTRICT shall retain discretion in and control of the litigation, negotiation, compromise, settlement, and appeals therefrom, as required by applicable law.

**C. Rights and Remedies are Cumulative**

The rights and remedies are cumulative of those provided for elsewhere in this Agreement and those allowed under the laws of the United States, the State of California, and the local laws under which the SANITATION DISTRICT operates.

**D. Business Non-Interruption**

1. Should CONTRACTOR have information that (1) any of the Work Products allegedly or actually infringe or may infringe on any third-party intellectual property rights, including, without limitation, patents, copyrights, trademarks, trade secrets, and other proprietary information, or (2) any of the licenses procured on behalf of the SANITATION DISTRICT under this Agreement is due to expire, to be terminated, or enjoined sooner than the term procured for, CONTRACTOR shall immediately notify the SANITATION DISTRICT of such alleged, actual, or potential infringement or license status. Upon the SANITATION DISTRICT's request, CONTRACTOR shall, at CONTRACTOR's own expense:
  - a. Procure for the SANITATION DISTRICT the right or license to continue using the intellectual property at issue; or
  - b. Replace the intellectual property at issue with a functionally equivalent, non-infringing product, if practicable.
2. Exercise of any of the above-mentioned options shall not cause undue business interruption to the SANITATION DISTRICT or diminish the intended benefits and use of the Work Products by the SANITATION DISTRICT under the specifications herein.

**6.8 Survivability**

All rights and remedies available to the SANITATION DISTRICT under this Agreement and all provisions of Article 6 shall survive the expiration or other termination of this Agreement.



## **ARTICLE VII OTHER GENERAL PROVISIONS**

### **7.1 Wage Requirements**

To the extent CONTRACTOR intends to utilize employees who will perform work during the Agreement, as more specifically defined under Labor Code Section 1720, CONTRACTOR shall be subject to prevailing wage requirements with respect to such employees.

### **7.2 Drug Free Workplace**

CONTRACTOR hereby certifies that it will provide a drug-free workplace consistent with the requirements of California Government Code section 8355 and any other applicable law or regulation.

### **7.3 Non-Discrimination and Equal Opportunity Requirements**

- A. CONTRACTOR hereby declares that it has not violated or been found in violation by final judgment (after all appeals have been exhausted) of a court of competent jurisdiction, of discrimination pursuant to any law, including, without limitation, California Government Code section 12940. CONTRACTOR further declares that during the performance of the Agreement, CONTRACTOR will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. CONTRACTOR will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin. Such actions shall include, but not be limited to, employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training or apprenticeship.
- B. In every contract with Subcontractors or Subconsultants, CONTRACTOR shall include provisions regarding non-discrimination in employment consistent with the requirements above.

### **7.4 Independent Contractors**

- A. The legal relationship between the parties herein is that of an independent contractor and nothing herein shall be construed as creating an employment or agency relationship. CONTRACTOR shall act independently and not as an officer or employee of the SANITATION DISTRICT and, as such, the SANITATION DISTRICT assumes no liability for CONTRACTOR's action and performance nor assumes responsibility for taxes, funds, payments, or other commitments, implied or expressed, by or for CONTRACTOR. CONTRACTOR shall be obligated to pay any and all applicable Federal, State, and local payroll and other taxes incurred as a result of fees hereunder.
- B. CONTRACTOR shall not be entitled to any benefits accorded to those individuals listed on the SANITATION DISTRICT's payroll as regular employees including, without limitation, worker's compensation, disability insurance, vacation, holiday, or sick pay. CONTRACTOR shall be responsible for providing, at CONTRACTOR's expense, disability, worker's compensation, and other insurance as well as licenses and permits usual or necessary for

performing the Work hereunder. CONTRACTOR shall remain ineligible for such benefits or participation in such benefit plans even if a court later determines that the SANITATION DISTRICT misclassified CONTRACTOR for tax purposes.

- C. CONTRACTOR shall not be considered an agent of the SANITATION DISTRICT for any purpose whatsoever nor shall CONTRACTOR have the right to, and shall not, commit the SANITATION DISTRICT to any agreement, contract, or undertaking. In addition, CONTRACTOR shall not use the SANITATION DISTRICT's name in its promotional material or for any advertising or publicity purposes without prior expressed written consent of the SANITATION DISTRICT.
- D. CONTRACTOR hereby indemnifies the SANITATION DISTRICT for any claims, losses, costs, fees, liabilities, damages, and penalties suffered by the SANITATION DISTRICT arising out of CONTRACTOR's breach of this provision.

## **7.5 Public Records**

This Agreement is a public document subject to the California Public Records Act ("PRA") and, as such, may be subject to public review. All documents in connection with the Agreement are subject to disclosure unless a specific exemption in the PRA applies. If CONTRACTOR submits information clearly marked confidential or proprietary, the SANITATION DISTRICT may protect such information and treat it with confidentiality only to the extent permitted by law. Should the SANITATION DISTRICT choose to withhold such information, it will be the responsibility of CONTRACTOR to provide to the SANITATION DISTRICT the specific legal grounds on which the SANITATION DISTRICT can rely in withholding information requested under the PRA. General references to sections of the PRA will not suffice. Rather, CONTRACTOR must provide a specific and detailed legal basis, including applicable case law, that clearly establishes the requested information is exempt from the disclosure requirements of the PRA. If CONTRACTOR does not provide a specific and detailed legal basis for withholding the requested information within a time specified by the SANITATION DISTRICT, the SANITATION DISTRICT will release the information as required by the PRA and CONTRACTOR will hold the SANITATION DISTRICT harmless for the release of this information. CONTRACTOR may timely seek, at CONTRACTOR's sole cost and expense, a protective order or other judicial determination to prevent disclosure of any such information. It will be CONTRACTOR's obligation to defend, at CONTRACTOR's expense, any legal actions or challenges seeking to obtain from the SANITATION DISTRICT any information requested under the PRA withheld by the SANITATION DISTRICT at CONTRACTOR's request. Furthermore, CONTRACTOR shall indemnify the SANITATION DISTRICT and hold it harmless for any claim or liability and defend any action brought against the SANITATION DISTRICT resulting from the SANITATION DISTRICT's refusal to release information requested under the PRA withheld at CONTRACTOR's request. Nothing in this Agreement creates any obligation for the SANITATION DISTRICT to notify CONTRACTOR or obtain CONTRACTOR's approval or consent before releasing information subject to disclosure and not clearly marked confidential or proprietary.

## **7.6 Governing Law and Jurisdiction**

This Agreement shall be governed by and interpreted under the laws of the State of California with venue in Orange County for any claim or action in connection with this Agreement or the performance thereof.

## **7.7 Precedence of Documents**

If an apparent conflict or inconsistency exists between the main body of this Agreement and the exhibits and other incorporated documents, the main body of this Agreement shall control. If a conflict exists between an applicable Federal; State; or local law, rule, regulation, order, or code and this Agreement, the law, rule, regulation, order, or code shall control. Varying degrees of stringency among the main body of this Agreement; the exhibits; other incorporated documents; and laws, rules, regulations, orders, or codes are not deemed conflicts and the most stringent requirement shall control. Each party shall notify the other immediately upon the identification of any apparent conflict or inconsistency concerning this Agreement.

In resolving inconsistencies or ambiguities among two (2) or more documents of this Agreement, the document highest in precedence shall control. The precedence shall be as follows:

- A. Applicable law
- B. This Agreement
- C. Exhibit 6 – Escrow Agreement
- D. Exhibit 7 - General Conditions
- E. Exhibit 8 – General Requirements (Division 1)
- F. Exhibit 4 - Unit Prices
- G. Exhibit 9 - Standard Specifications
- H. Exhibit 10 - Reference Specifications
- I. Exhibit 11 - Reference Plans

## **7.8 No Waiver**

No failure of either the SANITATION DISTRICT or CONTRACTOR to insist upon the strict performance by the other of any covenant, term, or condition of this Agreement nor any failure to exercise any right or remedy consequent upon a breach of any covenant, term, or condition of this Agreement shall constitute a waiver of any such breach of such covenant, term, or condition. No waiver of any breach shall affect or alter this Agreement and each and every covenant, term, and condition hereof shall continue in full force and effect without respect to any existing or subsequent breach.

## **7.9 Successors in Interest**

This Agreement and all rights and obligations created by this Agreement shall be in force and effect whether or not any parties to the Agreement have been succeeded by another entity and all rights and obligations created by this Agreement shall be vested and binding on any party's successor in interest.

## 7.10 Non-Assignment

CONTRACTOR shall not delegate any duties nor assign any rights under this Agreement without the SANITATION DISTRICT's prior written consent. Any such attempted delegation or assignment shall be null and void.

## 7.11 Attorney's Fees

If any action at law or inequity or if any proceeding in the form of an Alternative Dispute Resolution is necessary to enforce or interpret the terms of this Agreement, the prevailing party shall be entitled to reasonable attorney's fees, costs, and necessary disbursements in addition to any other relief to which it may be entitled.

## 7.12 Notices

All notices under this Agreement must be in writing. Written notice shall be delivered by personal service; regular U.S. mail; registered or certified mail, postage prepaid, return receipt requested; or by any other overnight delivery service which delivers to the noticed destination and provides proof of delivery to the sender. Rejection or other refusal to accept or the inability to deliver because of changed address of which no notice was given as provided hereunder shall be deemed to be receipt of the notice, demand, or request sent. All notices shall be effective when first received at the following addresses:

The SANITATION DISTRICT:

Orange County Sanitation District  
10844 Ellis Avenue  
Fountain Valley, CA 92708  
Attention: Contracts Administration

And

*Project Manager,*  
Orange County Sanitation District  
10844 Ellis Avenue  
Fountain Valley, CA 92708  
Attention: Donald Cutler

*With a Copy To:*  
Bradley R. Hogin, Esq.  
Woodruff, Spradlin & Smart  
555 Anton Boulevard, Suite 1200  
Costa Mesa, CA 92626

CONTRACTOR:

ABB Inc.  
3055 Orchard Drive  
San Jose, CA 95134

Attention: \_\_\_\_\_

SURETY:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Attention: \_\_\_\_\_

**7.13 Section Headings and Contract Interpretation**

All titles, subtitles, and/or section headings appearing herein have been inserted for convenience and shall not be deemed to govern, limit, modify, or in any manner affect the scope, meaning, intent, or construction of any of the terms or provisions hereof. The language of this Agreement shall be construed according to its fair meaning and not strictly for or against the SANITATION DISTRICT or CONTRACTOR. The singular shall include the plural; use of feminine, masculine, or neutral genders shall be deemed to include the genders not used.

**7.14 Drafting Ambiguities**

The parties agree that they are aware that they have the right to be advised by counsel with respect to the negotiations and terms and conditions of this Agreement. The decision of whether or not to seek advice of counsel with respect to this Agreement is a decision which is the sole responsibility of each party. This Agreement shall not be construed in favor of or against either party by reason of the extent to which each Party participated in the drafting of the Agreement.

**7.15 Exhibits Incorporated.**

All Exhibits referenced in this Agreement are incorporated into the Agreement by this reference.

**7.16 Severability**

The unenforceability, invalidity, or illegality of any provision of this Agreement shall not render any other provision of this Agreement unenforceable, invalid, or illegal.

**7.17 Agency Powers**

Nothing contained in this Agreement shall be construed as a limitation upon the powers of the SANITATION DISTRICT under the laws of the State of California.

**7.18 Counterparts**

This Agreement may be executed in counterparts all of which when taken together shall constitute a single, signed document as though all parties had executed the same agreement.

### **7.19 Entire Agreement**

This Agreement and the exhibits, documents, and document references incorporated into this Agreement, including the RFQ, Requests for Information, RFP, and CONTRACTOR's SOQs, fully express all understandings of the parties concerning the matters covered in this Agreement. No change, alteration, amendment, or modification of the terms or conditions of this Agreement and no verbal understanding of the parties, their officers, agents, or employees shall be valid unless made in the form of a written change agreed to in writing by both parties. All prior negotiations and agreements are merged into this Agreement.

### **7.20 Amendments**

The Agreement may be supplemented, amended, or modified only by the mutual written agreement of the parties.

[Intentionally left blank. Signatures follow on next page.]

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**EXECUTION**

**IN WITNESS WHEREOF**, the Agreement has been executed in the name of the SANITATION DISTRICT, by its officers thereunto duly authorized, and CONTRACTOR as of the day and year first written above.

**CONTRACTOR: ABB INC.**

By \_\_\_\_\_  
Signature Date  
\_\_\_\_\_  
Printed Name & Title

**ORANGE COUNTY SANITATION DISTRICT**

By \_\_\_\_\_  
John B. Withers Date  
Board Chairman

By \_\_\_\_\_  
Kelly A. Lore Date  
Clerk of the Board

**APPROVED AS TO FORM**

By: \_\_\_\_\_  
Date  
\_\_\_\_\_  
General Counsel

By \_\_\_\_\_  
Ruth Zintzun Date  
Purchasing & Contracts Manager

EXHIBIT 1

List of Lift/Pump Stations

[To be inserted]

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EXHIBIT 2

Project J-120 Scope of Work

[To be inserted]

DRAFT

EXHIBIT 3

Signed Non-disclosure Agreement

[To be inserted]

DRAFT

EXHIBIT 4

Unit Prices

[To be inserted]

DRAFT

EXHIBIT 5

Safety Standards

[To be inserted]

DRAFT

EXHIBIT 6

Escrow Agreement

[To be inserted]

DRAFT

EXHIBIT 7

General Conditions

[To be inserted]

DRAFT

EXHIBIT 8

General Requirements

[To be inserted]

DRAFT

EXHIBIT 9

Standard Specifications

[To be inserted]

DRAFT



EXHIBIT 10

Reference Specifications

[To be inserted]

DRAFT

EXHIBIT 11

Reference Plans

[To be inserted]

DRAFT

EXHIBIT 12

Allowable Direct Costs

[To be inserted]

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