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|---|--------------------------------------|
| Council/Agency Meeting Held: _____ | _____ City Clerk's Signature |
| Deferred/Continued to: _____ | |
| <input type="checkbox"/> Approved <input type="checkbox"/> Conditionally Approved <input type="checkbox"/> Denied | |
| Council Meeting Date: 6/20/2005 | Department ID Number: PW 05-040 |

**CITY OF HUNTINGTON BEACH
REQUEST FOR CITY COUNCIL ACTION**

SUBMITTED TO: HONORABLE MAYOR AND CITY COUNCIL MEMBERS

SUBMITTED BY: *Penelope Culbreth Graft*
PENELOPE CULBRETH-GRAFT, CITY ADMINISTRATOR

PREPARED BY: PAUL EMERY, ACTING DIRECTOR OF PUBLIC WORKS

RF Beardsley
ROBERT F. BEARDSLEY, ACTING DIRECTOR OF ECONOMIC DEVELOPMENT

SUBJECT: **Award Contract for the Construction of Curb Ramps at Various Locations and Construction of Curb and Gutter on Santa Anita Lane and Cleveland Avenue, MSC-427**

2005 JUN 26 AM 11:27
HUNTINGTON BEACH, CA
CITY CLERK

Statement of Issue, Funding Source, Recommended Action, Alternative Action(s), Analysis, Environmental Status, Attachment(s)

Statement of Issue: Bids have been received for the construction of curb ramps at various locations and construction of curb and gutter on Santa Anita Lane and of Cleveland Avenue, MSC-427. Nobest, Inc. submitted the lowest responsible bid. Staff is requesting authorization to award the construction contract to Nobest, Inc., and proceed with the project.

Funding Source: Funds in the total amount of \$409,467 have been designated for this purpose from Community Development Block Grant (CDBG) FY 2004/05 Citywide ADA Ramps, Account No. 86790002.82300 (\$182,112) and FY 2004/05 Curb/Sidewalk Construction 86790001.82300 (\$227,355). Funding of up to \$10,000 from General Fund, Street Maintenance Account No. 10085410.64620 is available for contingency and supplemental expenses.

Recommended Action: Motion to:

1. Approve the project specifications;
2. Accept the lowest responsible bid submitted by Nobest, Inc. in the amount of \$382,002 for MSC 427; and
3. Authorize the Mayor and City Clerk to execute a construction contract in substantially the same form as the attached sample contract.

Alternative Action(s): Do not authorize award of this contract and direct staff how to proceed. Failure to use these funds may result in the loss of CDBG funding for this project.

REQUEST FOR ACTION

MEETING DATE: 6/20/2005

DEPARTMENT ID NUMBER: PW 05-040

Analysis: On August 2, 2004, the City Council authorized the expenditure of Community Development Block Grant funds for the construction of curb ramps at various locations and for the construction of improvements on Santa Anita Lane and Cleveland Avenue. The first project will consist of curb ramp installation at 119 locations as requested by residents. The second part of the project will include the construction of street improvements on Santa Anita Lane (#28) and Cleveland Avenue (#46) in accordance with the Tree Petition List. These streets are located within the Bolsa Chica-Heil and Yorktown Enhancement Areas, respectively, and are eligible for CDBG funding. Construction will include removal and replacement of the trees, and new construction of the sidewalk, curb, and gutter.

The engineer's estimate for this project was \$370,000.

Bids were opened publicly on May 12, 2005, and are listed in ascending order:

| | Bidding Contractor | Bid Amount |
|----|-------------------------------|--------------|
| 1. | Nobest, Inc. | \$382,002.00 |
| 2. | Elite Bobcat Service, Inc. | \$442,346.30 |
| 3. | Damon Construction Co. | \$531,166.60 |
| 4. | Portsmouth Construction, Inc. | \$585,557.00 |

Staff has performed a reference check on Nobest, Inc. and received acceptable responses from past clients. The City has also had positive experience with this contractor's past performance.

Public Works Commission Action: The Public Works Commission reviewed and unanimously approved this project on March 16, 2005.

Environmental Status: This project has been determined to be Categorical Exempt.

Attachment(s):

| City Clerk's Page Number | No. | Description |
|--------------------------|-----|--|
| 3 | 1. | Sample CDBG Funded Construction Contract |

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ATTACHMENT #1

FEDERALLY FUNDED COMMUNITY DEVELOPMENT BLOCK
GRANT CONSTRUCTION CONTRACT BETWEEN
THE CITY OF HUNTINGTON BEACH AND

FOR

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FEDERALLY FUNDED COMMUNITY DEVELOPMENT
BLOCK GRANT CONSTRUCTION CONTRACT

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FEDERALLY FUNDED COMMUNITY DEVELOPMENT BLOCK
GRANT CONSTRUCTION CONTRACT BETWEEN
THE CITY OF HUNTINGTON BEACH AND

FOR

THIS AGREEMENT ("Agreement") made and entered into this _____ day of _____ 20____, by and between the City of Huntington Beach, a municipal corporation of the State of California, hereinafter referred to as "CITY," and _____, a California _____ hereinafter referred to as "CONTRACTOR."

WHEREAS, CITY has solicited bids for a public works project, hereinafter referred to as "PROJECT," more fully described as _____ in the City of Huntington Beach; and

The PROJECT to which the construction work covered by this Agreement pertains is being assisted by the United States of America and Federal Labor Standards Provisions are included in this Agreement pursuant to the provisions applicable to such Federal assistance.

Housing and Urban Development Act of 1968, as amended in 1992, Section 3, Title 24, Code of the Federal Regulations, Part 135, Economic Opportunities for Low- and Very Low-Income Persons, Section 3 contract clauses, the work to be performed under this Agreement is subject to the requirements of Section 3 of the Housing and Urban Development Act of 1968, as amended, 12 U.S.C. 1701u (section 3). The purpose of Section 3 is to ensure that employment and other economic opportunities generated by HUD assistance or HUD assisted projects covered by Section 3, shall, to the greatest extent feasible, be directed to low- and very low-

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income persons, particularly persons who are recipients of HUD assistance for housing; and CONTRACTOR has been selected and is to perform said work;

NOW, THEREFORE, in consideration of the promises and agreements hereinafter made and exchanged, the parties covenant and agree as follows:

1. STATEMENT OF WORK; ACCEPTANCE OF RISK

CONTRACTOR shall complete and construct the PROJECT pursuant to this Agreement and the Contract Documents (as hereinafter defined) and furnish, at its own cost and expense, all labor, plans, tools, equipment, supplies, transportation, utilities and all other items, services and facilities necessary to complete and construct the PROJECT in a good and workmanlike manner.

CONTRACTOR agrees to fully assume the risk of all loss or damage arising out of the nature of the PROJECT, during its progress or prior to acceptance by CITY, from the action of the elements, from any unforeseen difficulties which may arise or be encountered in the prosecution of work, and for all other risks of any description in connection with the work, including, but not limited to, all expenses incurred by or in consequence of the suspension or discontinuance of work, except such as are herein expressly stipulated to be borne by CITY, and for well and faithfully completing the work within the stipulated time and in the manner shown and described in this Agreement, and in accordance with the requirements of CITY for the compensation set forth in the accepted bid proposal.

2. ACCEPTANCE OF CONDITIONS OF WORK; PLANS AND SPECIFICATIONS

CONTRACTOR acknowledges that it is fully familiar with all the terms, conditions and obligations of this Agreement and the Contract Documents (as defined below in

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this Section), the location of the job site, and the conditions under which the work is to be performed, and that it enters into this Agreement based upon its thorough investigation of all such matters and is relying in no way upon any opinions or representations of CITY.

It is agreed that the Contract Documents are incorporated into this Agreement by this reference, with the same force and effect as if the same were set forth at length herein, and that CONTRACTOR and its subcontractors, if any, shall be bound by the Contract Documents insofar as they relate in part or in any way, directly or indirectly, to the work covered by this Agreement.

"Contract Documents" as defined herein mean and include:

- A. This Agreement;
- B. Bonds covering the work herein agreed upon;
- C. The CITY's standard Plans and Specifications and special contractual provisions, including those on file in the office of the Director of Public Works of CITY and adopted by the City Council, and any revisions, amendments or addenda thereto;
- D. The current edition of *Standard Specifications for Public Works Construction*, published by Builders' News, Inc., 10801 National Boulevard, Los Angeles, CA 90064, and all amendments thereto, written and promulgated by the Southern California chapter of the American Public Works Association and the Southern California District Associated General Contractors of the California Joint Cooperative Committee;

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- E. Bid documents including the Notice Inviting Bids, the Special Instructions to Bidders and the CONTRACTOR's proposal, (which is attached hereto as **Exhibit "A"** and incorporated herein by this reference);
- F. The particular Plans, Specifications, Special Provisions and Addenda applicable to the PROJECT. Anything mentioned in the Specifications and not indicated in the Plans or indicated in the Plans and not mentioned in the Specifications, shall be of like effect as if indicated and mentioned in both. In case of a discrepancy between any Plans, Specifications, Special provisions, or Addenda, the matter shall be immediately submitted by CONTRACTOR to the Department of Public Works of CITY (hereinafter referred to as "DPW"), and CONTRACTOR shall not attempt to resolve or adjust the discrepancy without the decision of DPW, save only at its own risk and expense.

Should there be any conflict between the terms of this Agreement and the bid or proposal of CONTRACTOR, then this Agreement shall control and nothing herein shall be considered as an acceptance of the terms of the bid or proposal which is in conflict herewith.

3. COMPENSATION

CITY agrees to pay and CONTRACTOR agrees to accept as full compensation for the faithful performance of this Agreement, subject to any additions or deductions made under the provisions of this Agreement or the Contract Documents, a sum not to exceed _____ Dollars (\$ _____), as set forth in the Contract Documents, to be paid as provided in this Agreement.

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4. COMMENCEMENT OF PROJECT

CONTRACTOR agrees to commence the PROJECT within ten (10) working days after the Notice To Proceed is issued and diligently prosecute the PROJECT to completion within _____ () consecutive _____ from the day the Notice to Proceed is issued by DPW, excluding delays provided for in this Agreement.

5. TIME OF THE ESSENCE

The parties hereto recognize and agree that time is of the essence in the performance of this Agreement and each and every provision of the Contract Documents.

CONTRACTOR shall prepare and obtain approval as required by the Contract Documents for all shop drawings, details and samples, and do all other things necessary and incidental to the prosecution of its work in conformance with the progress schedule set forth in the Contract Documents. CONTRACTOR shall coordinate its work with the work of all other contractors, subcontractors, and CITY forces working on the PROJECT in a manner that will facilitate the efficient completion of the PROJECT and in accordance with the terms and provisions of this Agreement. CITY shall have complete control of the premises on which the work is to be performed and shall have the right to decide the time and order in which the various portions of the work shall be performed and the priority of the work of other contractors, subcontractors and CITY forces and, in general, all matters concerning the timely and orderly conduct of the work of CONTRACTOR on the premises.

6. CHANGES

CONTRACTOR shall adhere strictly to the plans and specifications set forth in the Contract Documents unless a change therefrom is authorized in writing by DPW. CONTRACTOR agrees to make any and all changes, furnish materials and perform all work

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necessary within the scope of the PROJECT as DPW may require in writing. Under no condition shall CONTRACTOR make any changes without the prior written order or acceptance of DPW, and CITY shall not pay any extra charges made by CONTRACTOR that have not been agreed upon in writing by DPW.

When directed to change the work, CONTRACTOR shall submit immediately to DPW a written cost proposal reflecting the effect of the change. Should DPW not agree to such cost proposal, the work shall be performed according to the changes ordered in writing by DPW and the proper cost thereof shall be negotiated by the parties upon cost and pricing data submitted by CONTRACTOR; thereupon, CITY will promptly issue an adjusted change order to CONTRACTOR and the Agreement price will be adjusted upward or downward accordingly.

7. NOTICE TO PROCEED

No work, services, material, or equipment shall be performed or furnished under this Agreement unless and until a Notice to Proceed has been given to CONTRACTOR by CITY. CITY does not warrant that the work will be available on the date the Notice to Proceed is issued. In the event of a delay in commencement of the work due to unavailability of the job site, for any reason, relief to CONTRACTOR shall be limited to a time extension equal to the delay due to such unavailability.

8. BONDS

Only bonds issued by California admitted sureties will be accepted. CONTRACTOR shall, prior to its performance of this Agreement, furnish the following two (2) bonds approved by the City Attorney: One in the amount of one hundred percent (100%) of the Agreement price to guarantee the CONTRACTOR's faithful performance of the work, and one in

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the amount of one hundred percent of the Agreement price to guarantee payment of all claims for labor and materials furnished.

In addition, CONTRACTOR shall submit to CITY a bond in the amount of one hundred percent (100%) of the final Agreement price, including all change orders, to warrant such performance for a period of one (1) year after CITY's acceptance thereof within ten (10) days of filing of the Notice of Completion.

9. WARRANTIES

CONTRACTOR unconditionally guarantees all work done under this Agreement including, but not limited to, any workmanship, installation, fabrication, material or structural facilities constructed. CONTRACTOR, within ten (10) days after notice by CITY of any defect in the work, shall have the option to make appropriate repairs or replace the defective item or items. Upon expiration of such ten (10) day period, CITY may then make appropriate repair or replacement at CONTRACTOR's risk and own cost and expense.

10. INDEPENDENT CONTRACTOR

It is understood and agreed that CONTRACTOR is, and shall be, acting at all times hereunder as an independent contractor and not an employee of CITY. CONTRACTOR shall secure at its own cost and expense, and be responsible for any and all payment of all taxes, social security, state disability insurance compensation, unemployment compensation and other payroll deductions for CONTRACTOR and its officers, agents and employees and all business licenses, if any, in connection with the PROJECT and/or the services performed hereunder.

11. LIQUIDATED DAMAGES/DELAYS

It is agreed by the parties hereto that in case the total work called for hereunder is not in all parts and requirements finished or completed within the number of calendar days as set

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forth herein, damage will be sustained by CITY; and that it is, and would be, impractical and extremely difficult to ascertain and determine the actual damage which CITY would sustain in the event of and by reason of such delay. It is, therefore, agreed that CONTRACTOR will pay to CITY, as liquidated damages and not as a penalty, the sum of _____ Dollars (\$ _____) per day for each and every working day's delay in completing the work in excess of the number of working/calendar days set forth herein, which represents a reasonable endeavor by the parties hereto to estimate a fair compensation for the foreseeable damages CITY would sustain in the event of and by reason of such delay; and CONTRACTOR agrees to pay these damages herein provided, and further agrees that CITY may deduct the amount thereof from any monies due or that may become due to CONTRACTOR hereunder.

CONTRACTOR will be granted an extension of time and will not be assessed damages for any portion of the delay in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of CONTRACTOR, including, but not limited to, acts of God or of the public enemy, fire, floods, epidemics, quarantine restrictions, strikes, unsuitable weather, or delays of subcontractors due to such causes.

CONTRACTOR shall, within fifteen (15) days from the beginning of any such delay (unless DPW shall grant a further period of time), notify DPW in writing of the cause of the delay and CITY shall extend the time for completing the work if, in its judgment, the findings of fact thereon justify the delay; and the decision of DPW shall be conclusive on the parties hereto.

Should CONTRACTOR be delayed in the prosecution or completion of the work by the act, neglect or default of CITY, or should CONTRACTOR be delayed by waiting for materials required by this Agreement to be furnished by CITY, or by damage caused by fire or

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other casualty at the job site for which CONTRACTOR is not responsible, or by the combined action of the workers, in no way caused by or resulting from default or collusion on the part of CONTRACTOR, or in the event of a lockout by CITY, then the time herein fixed for the completion of the work shall be extended by the number of days CONTRACTOR has thus been delayed, but no allowance or extension shall be made unless a claim therefor is presented in writing to CITY within fifteen (15) days of the commencement of such delay.

No claims for additional compensation or damages for delays, irrespective of the cause thereof, and including without limitation the furnishing of materials by CITY or delays by other contractors or subcontractors, will be allowed and an extension of time for completion shall be the sole remedy of CONTRACTOR.

12. DIFFERING SITE CONDITIONS

A. Notice: CONTRACTOR shall promptly, and before such conditions are disturbed, notify DPW in writing of:

- (1) Subsurface or latent physical conditions at the job site differing materially from those indicated in this Agreement or the Contract Documents; or
- (2) Unknown physical conditions at the job site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inherent to work of the character to be performed under this Agreement. DPW shall promptly investigate the conditions and if it finds that such conditions do materially so differ and cause an increase or decrease in the time required for performance of any part of the work under this Agreement,

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whether or not changed as a result of such conditions, an equitable adjustment shall be made and the agreement modified in writing accordingly.

- B. Time Extension: No claim of CONTRACTOR under this Section shall be allowed unless CONTRACTOR has given the notice required hereunder provided, however, the time prescribed therefor may be extended by CITY.

13. VARIATIONS IN ESTIMATED QUANTITIES

The quantities listed in the bid schedule will not govern final payment. Payment to CONTRACTOR will be made only for the actual quantities of Agreement items used in construction of the PROJECT, in accordance with the plans and specifications. Upon completion of the PROJECT, if the actual quantities used are either more than or less than the quantities listed in the bid schedule, the bid price shall prevail subject to the provisions of this Section. DPW may, at its sole discretion, when warranted by the facts and circumstances, order an equitable adjustment, upwards or downwards, in payment to CONTRACTOR where the actual quantities used in construction of the PROJECT are in variation to the quantities listed in the bid schedule. No claim by CONTRACTOR for an equitable adjustment in price or time for completion shall be allowed if asserted after final payment under this Agreement. If the quantity variation is such as to cause an increase in the time necessary for completion, DPW shall ascertain the facts and circumstances and make such adjustment for extending the completion date as in its sole judgment the findings warrant.

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14. PROGRESS PAYMENTS

Each month DPW will make an estimate in writing of the work performed by CONTRACTOR and the value thereof. From each progress estimate, ten percent (10%) will be deducted and retained by CITY and the remainder of the progress estimate, less the amount of all previous payments since commencement of the work, will be paid to CONTRACTOR.

When CONTRACTOR has, in the judgment of DPW, faithfully executed fifty percent (50%) or more of the value of the work as determined from the bid schedule, and if DPW finds that satisfactory progress has been and is being made, CONTRACTOR may be paid such sum as will bring the payments of each month up to one hundred percent (100%) of the value of the work completed since the commencement of the PROJECT, as determined in its sole discretion by DPW, less all previous payments and less all previous retained amounts. CITY's final payment to CONTRACTOR, if unencumbered, or any part thereof unencumbered, shall be made thirty-five (35) days after the acceptance of the work and the filing of a Notice of Completion by CITY. Payments shall be made on demands drawn in the manner required by law, each payment to be accompanied by a certificate signed by DPW, affirming that the work for which payment is demanded has been performed in accordance with the terms of the Agreement and that the amount stated in the certificate is due under the terms of the Agreement. Partial payments on the Agreement price shall not be considered as a acceptance of any part of the work.

15. WITHHELD CONTRACT FUNDS, SUBSTITUTION OF SECURITIES

At the request and at the sole cost and expense of CONTRACTOR, who shall retain beneficial ownership and receive interest, if any thereon, CITY shall permit the

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substitution and deposit therewith of securities equivalent to the amount of any monies withheld by CITY to ensure performance under the terms of this Agreement.

16. AFFIDAVITS OF SATISFACTION OF CLAIMS

After the completion of the work contemplated by this Agreement, CONTRACTOR shall file with DPW its affidavit stating that all workers and persons employed, all firms supplying materials and all subcontractors working upon the PROJECT have been paid in full and that there are no claims outstanding against the PROJECT for either labor or material, except certain items, if any, to be set forth in CONTRACTOR's affidavit covering disputed claims, or items in connection with Notices to Withhold, which have been filed under the provisions of the statutes of the State of California.

17. WAIVER OF CLAIMS

The acceptance by CONTRACTOR of the payment of the final certificate shall constitute a waiver of all claims against CITY under or arising out of this Agreement.

18. INDEMNIFICATION, DEFENSE, HOLD HARMLESS

CONTRACTOR hereby agrees to protect, defend, indemnify and hold harmless CITY, its officers, elected or appointed officials, employees, agents, and volunteers from and against any and all, claims, damages, losses, expenses, judgments, demands defense costs, and consequential damage or liability of any kind or nature, however caused, including those resulting from death or injury to CONTRACTOR's employees and damage to CONTRACTOR's property, arising directly or indirectly out of the obligations or operations herein undertaken by CONTRACTOR, caused in whole or in part by any negligent act or omission of the CONTRACTOR, any subcontractors, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, including but not limited to concurrent active

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or passive negligence, except where caused by the active negligence, sole negligence, or willful misconduct of the CITY. CONTRACTOR will conduct all defense at its sole cost and expense and CITY shall approve selection of CONTRACTOR's counsel. This indemnity shall apply to all claims and liability regardless of whether any insurance policies are applicable. The policy limits do not act as a limitation upon the amount of indemnification to be provided by CONTRACTOR.

19. WORKERS' COMPENSATION AND EMPLOYER'S LIABILITY INSURANCE

Pursuant to *California Labor Code* Section 1861, CONTRACTOR acknowledges awareness of Section 3700 *et seq.* of this Code, which requires every employer to be insured against liability for workers' compensation; CONTRACTOR covenants that it will comply with such provisions prior to commencing performance of the work hereunder.

CONTRACTOR shall maintain workers' compensation and employer's liability insurance in an amount of not less than the State statutory limits.

CONTRACTOR shall require all subcontractors to provide such workers' compensation and employer's liability insurance for all of the subcontractors' employees. CONTRACTOR shall furnish to CITY a certificate of waiver of subrogation under the terms of the workers' compensation and employer's liability insurance and CONTRACTOR shall similarly require all subcontractors to waive subrogation.

20. INSURANCE

In addition to the workers' compensation and employer's liability insurance and CONTRACTOR's covenant to indemnify CITY, CONTRACTOR shall obtain and furnish to CITY, a policy of general public liability insurance, including motor vehicle coverage covering

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the PROJECT. This policy shall indemnify CONTRACTOR, its officers, employees and agents while acting within the scope of their duties, against any and all claims arising out or in connection with the PROJECT, and shall provide coverage in not less than the following amount: combined single limit bodily injury and property damage, including products/completed operations liability and blanket contractual liability, of One Million Dollars (\$1,000,000) per occurrence. If coverage is provided under a form which includes a designated general aggregate limit, the aggregate limit must be no less than One Million Dollars (\$1,000,000) for this PROJECT. This policy shall name CITY, its officers, elected or appointed officials, employees, agents, and volunteers as Additional Insureds, and shall specifically provide that any other insurance coverage which may be applicable to the PROJECT shall be deemed excess coverage and that CONTRACTOR's insurance shall be primary.

Under no circumstances shall said above-mentioned insurance contain a self-insured retention, or a "deductible" or any other similar form of limitation on the required coverage.

21. CERTIFICATES OF INSURANCE; ADDITIONAL INSURED ENDORSEMENTS

Prior to commencing performance of the work hereunder, CONTRACTOR shall furnish to CITY certificates of insurance subject to approval of the City Attorney evidencing the foregoing insurance coverages as required by this Agreement; the certificates shall:

1. provide the name and policy number of each carrier and policy;
2. state that the policy is currently in force; and
3. promise to provide that such policies will not be canceled or modified without thirty (30) days' prior written notice of CITY.

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CONTRACTOR shall maintain the foregoing insurance coverages in force until the work under this Agreement is fully completed and accepted by CITY.

The requirement for carrying the foregoing insurance coverages shall not derogate from the provisions for indemnification of CITY by CONTRACTOR under the Agreement. CITY or its representative shall at all times have the right to demand the original or a copy of all the policies of insurance. CONTRACTOR shall pay, in a prompt and timely manner, the premiums on all insurance hereinabove required.

CONTRACTOR shall provide a separate copy of the additional insured endorsement to each of CONTRACTOR's insurance policies, naming CITY, its officers, elected and appointed officials, employees, agents and volunteers as Additional Insureds, to the City Attorney for approval prior to any payment hereunder.

22. NOTICE OF THIRD PARTY CLAIM

Pursuant to *Public Contracts Code* §9202, CITY shall provide notice to CONTRACTOR of receipt of any claim filed with CITY or a court of competent jurisdiction which arises out of performance of this agreement within ten (10) days of receipt of such claim or claims.

23. DEFAULT AND TERMINATION

If CONTRACTOR fails or refuses to prosecute the work hereunder with diligence, or fails to complete the work within the time specified, or is adjudged bankrupt or makes an assignment for the benefit of creditors or becomes insolvent, or violates any provision of this Agreement or the Contract Documents, CITY may give CONTRACTOR notice in writing of its intention to terminate this Agreement. Unless the violation is cured within ten (10) days after such Notice of Intention has been served on CONTRACTOR, CITY may, without prejudice

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to any other remedy it may have, terminate this Agreement upon the expiration of that time. Upon such default by CONTRACTOR, CITY may elect not to terminate this Agreement; in such event CITY may make good the deficiency in which the default consists and deduct the resulting costs from the progress payments then or to become due to CONTRACTOR.

If it is subsequently determined by a court of competent jurisdiction that CITY's termination of this Agreement under this Section was wrongful, such termination shall be converted to a termination for convenience under Section 23 and any damages shall be assessed as set forth in Section 23.

24. TERMINATION FOR CONVENIENCE

CITY may terminate this Agreement for convenience at any time with or without cause, and whether or not PROJECT is fully complete upon seven (7) calendar days written notice to CONTRACTOR. In the event of termination, under this Section CITY shall pay CONTRACTOR for value of work in place on the PROJECT through the termination period plus seven and one-half percent (7 ½ %) for overhead and profit less all such payments already made. Such payment by CITY shall be CONTRACTOR's sole and exclusive remedy for termination by CITY for its convenience and CITY shall have no further obligation to CONTRACTOR.

25. DISPOSITION OF PLANS, ESTIMATES AND OTHER DOCUMENTS

CONTRACTOR agrees that upon completion of the work to be performed hereunder, or upon expiration or earlier termination of this Agreement, all original plans, specifications, drawings, reports, calculations, maps and other documents pertaining to this Agreement shall be delivered to CITY and become its sole property at no further cost.

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26. NONASSIGNABILITY

CONTRACTOR shall not sell, assign, transfer, convey or encumber this Agreement, or any part hereof, or any right or duty created herein, without the prior written consent of CITY and the surety.

27. CITY EMPLOYEES AND OFFICIALS

CONTRACTOR shall employ no CITY official nor any regular CITY employee in the work performed pursuant to this Agreement. No officer or employee of CITY shall have any financial interest in this Agreement in violation of the *California Government Code*.

28. STOP NOTICES; RECOVERY OF ADMINISTRATIVE COSTS

CITY shall be entitled to all reasonable administrative costs and necessary disbursements arising out of the processing of Stop Notices, Notices to Withhold, or any similar legal document. This obligation shall be provided for in the labor and materials payment bond required of CONTRACTOR. CITY may charge an administrative fee of One Hundred Dollars (\$100) for every Stop Notice filed in excess of two (2), regardless of whether or not CITY is named in an action to enforce such stop notices. CITY may set off any unreimbursed cost or expense so incurred against any sum or sums owed by CITY to CONTRACTOR under this Agreement.

29. NOTICES

Any notices, certificates, or other communications hereunder shall be given either by personal delivery to CONTRACTOR's agent (as designated in Section 1 hereinabove) or to CITY as the situation shall warrant, or by enclosing the same in a sealed envelope, postage prepaid, and depositing the same in the United States Postal Service, to the addresses specified below; provided that CITY and CONTRACTOR, by notice given hereunder, may designate

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different addresses to which subsequent notices, certificates or other communications will be sent:

TO CITY:

City of Huntington Beach
ATTN: _____
2000 Main Street
Huntington Beach, CA 92648

TO CONTRACTOR:

30. SECTION HEADINGS

The titles, captions, section, paragraph, and subject headings, and descriptive phrases at the beginning of the various sections in this Agreement are merely descriptive and are included solely for convenience of reference only and are not representative of matters included or excluded from such provisions, and do not interpret, define, limit or describe, or construe the intent of the parties or affect the construction or interpretation of any provision of this Agreement.

31. IMMIGRATION

CONTRACTOR shall be responsible for full compliance with the immigration and naturalization laws of the United States and shall, in particular, comply with the provisions of *United States Code* Section 1324a regarding employment verification.

32. LEGAL SERVICES SUBCONTRACTING PROHIBITED

CONTRACTOR and CITY agree that CITY is not liable for payment of any subcontractor work involving legal services, and that such legal services are expressly outside the scope of services contemplated hereunder. CONTRACTOR understands that pursuant to Huntington Beach City Charter Section 309, the City Attorney is the exclusive legal counsel for

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CITY; and CITY shall not be liable for payment of any legal services expenses incurred by CONTRACTOR.

33. ATTORNEY'S FEES

In the event suit is brought by either party to construe, interpret and/or enforce the terms and/or provisions of this Agreement or to secure the performance hereof, each party shall bear its own attorney's fees and the prevailing party shall not be entitled to recover its attorney's fees from the non-prevailing party.

34. INTERPRETATION OF THIS AGREEMENT

The language of all parts of this Agreement shall in all cases be construed as a whole, according to its fair meaning, and not strictly for or against any of the parties. If any provision of this Agreement is held by an arbitrator or court of competent jurisdiction to be unenforceable, void, illegal or invalid, such holding shall not invalidate or affect the remaining covenants and provisions of this Agreement. No covenant or provision shall be deemed dependent upon any other unless so expressly provided here. As used in this Agreement, the masculine or neuter gender and singular or plural number shall be deemed to include the other whenever the context so indicates or requires. Nothing contained herein shall be construed so as to require the commission of any act contrary to law, and wherever there is any conflict between any provision contained herein and any present or future statute, law, ordinance or regulation contrary to which the parties have no right to contract, then the latter shall prevail, and the provision of this Agreement which is hereby affected shall be curtailed and limited only to the extent necessary to bring it within the requirements of the law.

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35. GOVERNING LAW

This Agreement shall be governed and construed in accordance with the laws of the State of California.

36. DUPLICATE ORIGINAL

The original of this Agreement and one or more copies hereto have been prepared and signed in counterparts as duplicate originals, each of which so executed shall, irrespective of the date of its execution and delivery, be deemed an original. Each duplicate original shall be deemed an original instrument as against any party who has signed it.

37. CONSENT

Where CITY's consent/approval is required under this Agreement, its consent/approval for one transaction or event shall not be deemed to be consent/approval to any subsequent occurrence of the same or any other transaction or event.

38. COMPLIANCE WITH APPLICABLE REGULATIONS.

The parties to this Agreement agree to comply with HUD's regulations in 24 CFR part 135, which implement Section 3. As evidenced by their execution of this Agreement, the parties to this Agreement certify that they are under no contractual or other impediment that would prevent them from complying with the part 135 regulations.

CONTRACTOR agrees to send to each labor organization or representative of workers with which the CONTRACTOR has a collective bargaining agreement or other understanding, if any, a notice advising the labor organization or worker's representative of the CONTRACTOR's commitments under this Section 3 clause, and will post copies of the notice in conspicuous places at the work site where both employees and applicants for training and employment positions can see the notice. The notice shall describe the Section 3 preference,

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shall set forth minimum number and job titles subject to hire, availability of apprenticeship and training positions, the qualifications for each; and the name and location of the persons taking applications for each of the positions; and the anticipated date the work shall begin.

CONTRACTOR agrees to include the Section 3 clause in every subcontract subject to compliance with regulations in 24 CFR part 135, and agrees to take appropriate action, as provided in an applicable provision of the subcontract or in this Section 3 clause, upon a finding that the subcontractor is in violation of the regulations in 24 CFR part 135. CONTRACTOR will not subcontract with any subcontractor where CONTRACTOR has notice or knowledge that the subcontractor has been found in violation of the regulations in 24 CFR part 135.

CONTRACTOR will certify that any vacant employment positions, including training positions, that are filled (1) after the contractor is selected but before the Agreement is executed, and (2) with persons other than those to whom the regulations of 24 CFR part 135 require employment opportunities to be directed were not filled to circumvent the CONTRACTOR's obligations under 24 CFR part 135.

CONTRACTOR agrees and understands that noncompliance with HUD's regulations in 24 CFR part 135 may result in sanctions, termination of this Agreement for default, and debarment or suspension from future HUD assisted contracts, and

With respect to work performed in connection with Section 3 covered Indian housing assistance, Section 7(b) of the Indian Self Determination and Education Assistance Act (25 U.S.C. 450e) also applies to the work to be performed under this Agreement. Section 7(b) requires that to the greatest extent feasible (i) preference and opportunities for training and employment subcontracts shall be given to Indians, and (ii) preference in the award of contracts

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and subcontracts shall be given to Indian organizations and Indian-owned Economic Enterprises. Parties to this Agreement that are subject to the provisions of Section 3 and Section 7(b) agree to comply with Section 3 to the maximum extent feasible, but in derogation of compliance with Section 7(b).

39. MINIMUM WAGES

All laborers and mechanics employed or working upon the site of the work (or under the United States Housing Act of 1937 or under the Housing Act of 1949 in the construction or development of the project), will be paid unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account (except such payroll deductions as are permitted by regulations issued by the Secretary of Labor under the Copeland Act (29 CFR Part 3), the full amount of wages and bona fide fringe benefits (or cash equivalents thereof) due at time of payment computed at rates not less than those contained in the wage determination of the Secretary of Labor which is attached hereto and made a part hereof, regardless of any contractual relationship which may be alleged to exist between the CONTRACTOR and such laborers and mechanics. Contributions made or costs reasonably anticipated for bona fide fringe benefits under Section 1(b)(2) of the Davis-Bacon Act on behalf of laborers or mechanics are considered wages paid to such laborers or mechanics, subject to the provisions of 29 CFR 5.5(a)(1)(iv); also, regular contributions made or costs incurred for more than a weekly period (but not less often than quarterly) under plans, funds, or programs, which cover the particular weekly period, are deemed to be constructively made or incurred during such weekly period.

Such laborers and mechanics shall be paid the appropriate wage rate and fringe benefits on the wage determination for the classification of work actually performed, without

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regard to skill, except as provided in 29 CFR Part 5.5(a)(4). Laborers or mechanics performing work in more than one classification may be compensated at the rate specified for each classification for the time actually worked therein; provided that the employer's payroll records accurately set forth the time spent in each classification in which work is performed. The wage determination (including any additional classification and wage rates conformed under 29 CFR Part 5.5(a)(1)(ii) and the Davis-Bacon poster (WH-1321) shall be posted at all times by the CONTRACTOR and its subcontractors at the site of the work in a prominent and accessible place where it can be easily seen by the workers.

Any class of laborers or mechanics which is not listed in the wage determination and which is to be employed under the Agreement shall be classified in conformance with the wage determination. HUD shall approve an additional classification and wage rate and fringe benefits therefore only when the following criteria have been met:

- (1) The work to be performed by the classification requested is not performed by a classification in the wage determination; and
- (2) The classification is utilized in the area by the construction industry; and
- (3) The proposed wage rate, including any bona fide fringe benefits, bears a reasonable relationship to the wage rates contained in the wage determination.

If the CONTRACTOR and the laborers and mechanics to be employed in the classification (if known), or their representatives, and HUD or its designee agree on the classification and wage rate (including the amount designated for fringe benefits where appropriate), a report of the action taken shall be sent by HUD or its designee to the Administrator of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Washington, D.C. 20210. The Administrator, or an authorized

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representative, will approve, modify, or disapprove every additional classification action within 30 days of receipt and so advise HUD or its designee or will notify HUD or its designee within the 30-day period that additional time is necessary. (Approved by the Office of Management and Budget under OMB control number 1215-0140.)

In the event the CONTRACTOR, the laborers or mechanics to be employed in the classification or their representatives, and HUD or its designee do not agree on the proposed classification and wage rate (including the amount designated for fringe benefits, where appropriate), HUD or its designee shall refer the questions, including the views of all interested parties and the recommendation of HUD or its designee, to the Administrator for determination. The Administrator, or an authorized representative, will issue a determination within 30 days of receipt and so advise HUD or its designee or will notify HUD or its designee within the 30-day period that additional time is necessary. (Approved by the Office of Management and Budget under OMB Control Number 1215-0140.)

The wage rate (including fringe benefits where appropriate) determined pursuant to subparagraphs (1)(b) or (c) of this paragraph, shall be paid to all workers performing work in the classification under this Agreement from the first day on which work is performed in the classification.

Whenever the minimum wage rate prescribed in the Agreement for a class of laborers or mechanics includes a fringe benefit which is not expressed as an hourly rate, the CONTRACTOR shall either pay the benefit as stated in the wage determination or shall pay another bona fide fringe benefit or an hourly cash equivalent thereof.

If the CONTRACTOR does not make payments to a trustee or other third person, the CONTRACTOR may consider as part of the wages of any laborer or mechanic the amount of

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any costs reasonably anticipated in providing bona fide fringe benefits under a plan or program; provided that the Secretary of Labor has found, upon the written request of the CONTRACTOR, that the applicable standards of the Davis-Bacon Act have been met. The Secretary of Labor may require the CONTRACTOR to set aside in a separate account assets for the meeting of obligations under the plan or program (Approved by the Office of Management and Budget under OMB Control Number 1215-0140.)

40. PREVAILING WAGE LAW.

The CITY has ascertained from the U. S. Department of Housing and Urban Development ("HUD") the general prevailing rate of per diem wages and the general prevailing rate for legal holiday and overtime work in the locality in which the work is to be performed for each craft or type of work needed to execute this Agreement, and the same has been set forth by resolution on file in the office of the City Clerk of CITY. CONTRACTOR and any subcontractor under it shall pay not less than said prevailing wage rates to all workers employed on this Public Works Agreement. CONTRACTOR agrees to secure payment of compensation to every employee.

41. WITHHOLDING.

HUD or its designee shall upon its own action or upon written request of an authorized representative of the Department of Labor withhold or cause to be withheld from the CONTRACTOR under this Agreement or any other Federal contract with the same prime contractor, or any other Federally-assisted contract subject to Davis-Bacon prevailing wage requirements, which is held by the same prime contractor so much of the accrued payments or advances as may be considered necessary to pay laborers and mechanics, including apprentices, trainees and helpers, employed by the CONTRACTOR or any subcontractor the full amount of

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wages required by the Agreement. In the event of failure to pay any laborer or mechanic, including any apprentice, trainee or helper, employed or working on the site of the work (or under the United States Housing Act of 1937 or under the Housing Act of 1949 in the construction or development of the project), all or part of the wages required by the Agreement, HUD or its designee may, after written notice to the CONTRACTOR, sponsor, applicant, or owner, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds until such violations have ceased, HUD or its designee may, after written notice to the CONTRACTOR, disburse such amounts withheld for and on account of the CONTRACTOR or subcontractor to the respective employees to whom they are due. The Comptroller General shall make such disbursements in the case of direct Davis-Bacon Act contracts.

42. HEALTH AND SAFETY.

No laborer or mechanic shall be required to work in surroundings or under working conditions which are unsanitary, hazardous, or dangerous to his health standards promulgated by the Secretary of Labor by regulation.

The CONTRACTOR shall comply with all regulations issued by the Secretary of Labor pursuant to Title 29 Part 1926 (formerly part 1518) and failure to comply may result in imposition of sanctions pursuant to the Contract Work Hours and Safety Standards Act (Public Law 91-54, 83 Stat. 96).

The CONTRACTOR shall include the provisions of this Article in every subcontract so that such provisions will be binding on each subcontractor. The CONTRACTOR shall take such action with respect to any subcontract as the Secretary of Housing and Urban Development or the Secretary of Labor shall direct as a means of enforcing such provisions.

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43. PAYMENT OF TRAVEL AND SUBSISTENCE ALLOWANCE.

Section 1773.8 of the *California Labor Code*, regarding the payment of travel and subsistence payments, is applicable to this PROJECT.

44. APPRENTICES AND TRAINEES.

Apprentices will be permitted to work at less than the predetermined rate for the work they performed when they are employed pursuant to and individually registered in a bona fide apprenticeship program registered with the U.S. Department of Labor, Employment and Training Administration, Bureau of Apprenticeship and Training, or with a State Apprenticeship Agency recognized by the Bureau, or if a person is employed in his or her first 90 days of probationary employment as an apprentice in such an apprenticeship program, who is not individually registered in the program, but who has been certified by the Bureau of Apprenticeship and Training or a State Apprenticeship Agency (where appropriate) to be eligible for probationary employment as an apprentice. The allowable ratio of apprentices to journeymen on the job site in any craft classification shall not be greater than the ratio permitted to the CONTRACTOR as to the entire work force under the registered program. Any worker listed on a payroll at an apprentice wage rate, who is not registered or otherwise employed as stated above, shall be paid not less than the applicable wage rate on the wage determination for the classification of work actually performed. In addition, any apprentice performing work on the job site in excess of the ratio permitted under the registered program shall be paid not less than the applicable wage rate on the wage determination for the work actually performed. Where a contractor is performing construction on a project in a locality other than that in which its program is registered, the ratios and wage rates (expressed in percentages of the journeyman's hourly rate) specified in the contractor's or subcontractor's registered program shall be observed.

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Every apprentice must be paid at not less than the rate specified in the registered program for the apprentice's level of progress, expressed as a percentage of the journeymen hourly rate specified in the applicable wage determination. Apprentices shall be paid fringe benefits in accordance with the provisions of the apprenticeship program. If the apprenticeship program does not specify fringe benefits, apprentices must be paid the full amount of fringe benefits listed on the wage determination for the applicable classification. If the Administrator determines that a different practice prevails for the applicable apprentice classification, fringes shall be paid in accordance with that determination. In the event the Bureau of Apprenticeship and Training, or a State Apprenticeship Agency recognized by the Bureau, withdraws approval of an apprenticeship[program, the CONTRACTOR will no longer be permitted to utilize apprentices at less than the applicable predetermined rate for the work performed until an acceptable program is approved.

Trainees. Except as provided in 29 CFR 5.16, trainees will not be permitted to work at less than the predetermined rate for the work performed unless they are employed pursuant to and individually registered in a program which has received prior approval, evidenced by formal certification by the U.S. Department of Labor, Employment and Training Administration. The ratio of trainees to journeymen on the job site shall not be greater than permitted under the plan approved by the Employment and Training Administration. Every trainee must be paid at not less than the rate specified in the approved program for the trainee's level of progress, expressed as a percentage of the journeyman hourly rate specified in the applicable wage determination. Trainees shall be paid fringe benefits in accordance with the provisions of the trainee program. If the trainee program does not mention fringe benefits, trainees shall be paid the full amount of fringe benefits listed on the wage determination unless

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the Administrator of the Wage and Hour Division determines that there is an apprenticeship program associated with the corresponding journeyman wage rate on the wage determination which provides for less than full fringe benefits for apprentices. Any employee listed on the payroll at a trainee rate who is not registered and participating in a training plan approved by the Employment and Training Administration shall be paid not less than the applicable wage rate on the wage determination for the work actually performed. In addition, any trainee performing work on the job site in excess of the ratio permitted under the registered program shall be paid not less than the applicable wage rate on the wage determination for the work actually performed. In the event the Employment and Training Administration withdraws approval of a training program, the CONTRACTOR will no longer be permitted to utilize trainees at less than the applicable predetermined rate for the work performed until an acceptable program is approved.

45. PAYROLLS AND BASIC RECORDS.

Payrolls and basic records relating thereto shall be maintained by the CONTRACTOR during the course of the work preserved for a period of three years thereafter for all laborers and mechanics working at the site of the work (or under the United States Housing Act of 1937, or under the Housing Act of 1949, in the construction or development of the project). Such records shall contain the name, address, and social security number of each such worker, his or her correct classification, hourly rates of wages paid (including rates of contributions or costs anticipated for bona fide fringe benefits or cash equivalents thereof of the types described in Section 1(b)(2)(B) of the Davis-Bacon Act), daily and weekly number of hours worked, deductions made and actual wages paid. Whenever the Secretary of Labor has found under 29 CFR 5.5 (a)(1)(iv) that the wages of any laborer or mechanic include the amount

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of any costs reasonably anticipated in providing benefits under a plan or program described in Section 1(b)(2)(B) of the Davis Bacon Act, the CONTRACTOR shall maintain records which show that the commitment to provide such benefits is enforceable, that the plan or program is financially responsible, and that the plan or program has been communicated in writing to the laborers or mechanics affected, and records which show the costs anticipated or the actual cost incurred in providing such benefits. Contractors employing apprentices or trainees under approved programs shall maintain written evidence of the registration of the apprentices and trainees, and the ratios and wage rates prescribed in the applicable programs. (Approved by the Office of Management and Budget under OMB Control Numbers 1215-0140 and 1215-0017.)

The CONTRACTOR shall submit weekly for each week in which any Agreement work is performed a copy of all payrolls to HUD or its designee if the agency is a party to the Agreement, but if the agency is not such a party, the CONTRACTOR will submit the payrolls to the applicant, sponsor, or owner, as the case may be, for transmission to HUD or its designee. The payrolls submitted shall set out accurately and completely all of the information required to be maintained under 29 CFR Part 5.5(a)(3)(i). This information may be submitted in any form desired. Optional Form WH-347 is available for this purpose and may be purchased from the Superintendent of Documents (Federal Stock Number 029-005-00014-1), U.S. Government Printing Office, Washington, DC 20402. The prime CONTRACTOR is responsible for the submission of copies of payrolls by all subcontractors. (Approved by the Office of Management and Budget under OMB Control Number 1215-0149.)

Each payroll submitted shall be accompanied by a "Statement of Compliance," signed by the CONTRACTOR or subcontractor or his or her agent who pays or supervises the payment of the persons employed under the Agreement and shall certify the following:

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That the payroll for the payroll period contains the information required to be maintained under 29 CFR Part 5.5(a)(3)(I) and that such information is correct and complete;

That each laborer or mechanic (including each helper, apprentice, and trainee) employed on the Agreement during the payroll period has been paid the full weekly wages earned, without rebate, either directly or indirectly, and that no deductions have been made either directly or indirectly from the full wages earned, other than permissible deductions as set forth in 29 CFR Part 3;

That each laborer or mechanic has been paid not less than the applicable wage rates and fringe benefits or cash equivalents for the classification of work performed, as specified in the applicable wage determination incorporated into the Agreement.

The weekly submission of a properly executed certification set forth on the reverse side of Optional Form WH-347 shall satisfy the requirement for submission of the "Statement of Compliance" required by paragraph A.3.(ii)(b) of this section.

The falsification of any of the above certifications may subject the CONTRACTOR or subcontractor to civil or criminal prosecution under Section 1001 of Title 18 and Section 231 of Title 31 of the United States Code.

The CONTRACTOR or subcontractor shall make the records required under this section available for inspection, copying, or transcription by authorized representatives of HUD or its designee or the Department of Labor, and shall permit such representatives to interview employees during working hours on the job. If the CONTRACTOR or subcontractor fails to submit the required records or to make them available, HUD or its designee may, after written notice to CONTRACTOR, sponsor, applicant, or owner, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds. Furthermore,

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failure to submit the required records upon request or to make such records available may be grounds for debarment action pursuant to 29 CFR Part 5.12.

46. WITHHOLDING FOR UNPAID WAGES AND LIQUIDATED DAMAGES.

HUD or its designee shall upon its own action or upon written request of an authorized representative of the Department of Labor withhold or cause to be withheld, from any moneys payable on account of work performed by the CONTRACTOR or subcontractor under any such contract or any other Federal contract with the same prime contract, or any other Federally-assisted contract subject to the Contract Work Hours and Safety Standards Act, which is held by the same prime CONTRACTOR such sums as may be determined to be necessary to satisfy any liabilities of such CONTRACTOR or subcontractor for unpaid wages and liquidated damages as provided in the clause set forth in subparagraph (2) of this paragraph.

47. SUBCONTRACTS.

The CONTRACTOR or subcontractor shall insert in any subcontracts the clauses set forth in Section 44 of this Agreement and also a clause requiring the subcontractors to include these clauses in any lower tier subcontracts. The prime contractor shall be responsible for compliance by any subcontractor or lower tier subcontractor with the clauses set forth in Section 44.

48. FEDERAL PARTICIPATION.

The PROJECT pursuant to which the work covered by this Agreement is being executed is being assisted by the United States of America. Several Agreement provisions embodied herein are included in this Agreement in accordance with the provisions applicable to such federal assistance. As federal funds are financing all or part of this work, all of the statutes,

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rules and regulations promulgated by the Federal Government and applicable to the work will apply, and CONTRACTOR agrees to comply therewith.

49. DAVIS-BACON ACT.

CONTRACTOR agrees to pay and require all subcontractors to pay all employees on said PROJECT a salary or wage at least equal to the prevailing rate of per diem wage as determined by the Secretary of Labor in accordance with the Davis-Bacon Act (40 USC section 176a, *et seq.*) for each craft or type of worker needed to perform this Agreement. CONTRACTOR agrees to comply with all applicable federal labor standards provisions; said provisions are incorporated herein by this reference.

50. DISPUTES CONCERNING LABOR STANDARDS.

Disputes arising out of the labor standards provisions of this Agreement. Such disputes shall be resolved in accordance with the with the procedures of the Department of Labor set forth in 29 CFR Parts 5, 6, and 7. Disputes within the meaning of this clause include disputes between the CONTRACTOR (or any of its subcontractors) and HUD or its designee, the U.S. Department of Labor, or the employees or their representatives.

51. CERTIFICATION OF ELIGIBILITY.

By entering into this Agreement, the CONTRACTOR certifies that neither it (nor he or she) nor any person or firm who has an interest in the CONTRACTOR's firm is a person or firm ineligible to be awarded Government contracts by virtue of Section 3(a) of the Davis-Bacon Act or 29 CFR 5.12(a)(1) or to be awarded HUD contracts or participate in HUD programs pursuant to 24 CFR Part 24.

No part of this Agreement shall be subcontracted to any person or firm ineligible for award of a Government contract by virtue of Section 3(a) of the Davis-Bacon Act or 29 CFR

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5.12(a)(1) or to be awarded HUD contracts or participate in HUD programs pursuant to 24 CFR Part 24.

The penalty for making false statements is prescribed in the U.S. Criminal Code, 18 U.S.C. 1001. Additionally, U.S. Criminal Code, Section 1010, Title 18, U.S.C. "Federal Housing Administration transactions", provides in part "Whoever, for the purpose of...influencing in any way the action of such Administration...makes, utters or publishes any statement, knowing the same to be false...shall be fined not more than \$5,000 or imprisoned not more than two years, or both."

52. DISCRIMINATION, MINORITIES, ALIENS.

CONTRACTOR shall not discriminate nor allow its employees, agents, principals, or subcontractors to discriminate against any employee or applicant for employment on the basis of race, religious creed, national origin or sex. CONTRACTOR shall take affirmative steps to hire local qualified minority individuals when job opportunities occur and utilize local business firms when possible.

53. EQUAL EMPLOYMENT OPPORTUNITY.

The CONTRACTOR will comply with all provisions of Executive Order 11246, as amended, and 29 CFR Part 30.

The utilization of apprentices, trainees and journeymen under this part shall be in conformity with the equal employment opportunity requirements.

CONTRACTOR is required to have an affirmative action plan which declares that it does not discriminate on the basis of race, color, religion, creed, national origin, sex or age to ensure equality of opportunity in all aspects of employment.

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Section 503 of the Rehabilitation Act of 1973 (29 USC Section 701, *et seq.*) prohibits job discrimination because of handicap and requires affirmative action to employ and advance in employment qualified handicapped workers.

Section 402 of the Vietnam Era Veterans Readjustment Assistance Act of 1974 (38 USC Section 219 *et seq.*) prohibits job discrimination and requires affirmative action to comply and advance in employment (1) qualified Vietnam veterans during the first four (4) years after their discharge and (2) qualified disabled veterans throughout their working life if they have a thirty percent (30%) or more disability.

To ensure compliance with these requirements, the CONTRACTOR shall provide the City with its written affirmative action plan prior to commencement of work. The CONTRACTOR is required to provide the CITY with a listing of its subcontractors together with a completed affirmative action program from each subcontractor when applicable.

54. COPELAND "ANTI-KICKBACK" ACT.

CONTRACTOR and its subcontractors shall comply with the requirements of 29 CFR Part 3, which Act provides that each shall be prohibited from including, by any means, any person employed in the construction, completion, or repair of public work, to give up any part of the compensation to which he is otherwise entitled.

55. CONTRACT WORK HOURS AND SAFETY STANDARDS ACT.

The CONTRACTOR shall comply with the provisions of Section 103 and 107 of the contract Work Hours and Safety Standards Act (40 USC 327 *et seq.*) as supplemented by Department of Labor regulations (29 CFR, part 5). Under Section 103 of the Act each CONTRACTOR shall be required to compute the wages of every mechanic and laborer on the basis of a standard workday of eight (8) hours and standard workweek of forty (40) hours. Work

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in excess of the standard workday or workweek is permissible provided that the worker is compensated at a rate of not less than 1-1/2 times the basic rate of pay for all hours worked in excess of eight (8) hours in any calendar day or forty (40) hours in the workweek. Section 107 of the Act is applicable to construction work and provides that no laborer or mechanic shall be required to work in surroundings or under working conditions which are unsanitary, hazardous, or dangerous to his health and safety as determined under construction, safety and health standards promulgated by the secretary of Labor. These requirements do not apply to the purchase of supplies or materials or articles ordinarily available on the open market or contracts for transportation.

As used in this section, the terms "laborers" and "mechanics" include watchmen and guards.

56. IMPLEMENTATION OF CLEAN AIR ACT AND FEDERAL WATER POLLUTION CONTROL ACT.

- A. CONTRACTOR stipulates that all facilities to be utilized in the performance of this Agreement were not listed, on the date of contract award, on the United States Environmental protection Agency (EPA) List of Violating Facilities, pursuant to 40 CFR 15.20.
- B. The CONTRACTOR agrees to comply with all of the requirements of Section 114 of the clean Air Act and section 308 of the Federal Water Pollution Control Act and all regulations and guidelines listed thereunder.
- C. The CONTRACTOR shall promptly notify the CITY of the receipt of any communication from the Director, office of Federal Activities, EPA,

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indicating that a facility to be utilized pursuant to this Agreement is under consideration to be listed on the EPA List of Violating facilities.

D. The CONTRACTOR agrees to include or cause to be included the requirements of paragraph (a) through (d) of this section in every nonexempt subcontract, and further agrees to take such action as the Government may direct as a means of enforcing such requirements.

57. ENERGY CONSERVATION.

Agreements with federal participation shall recognize mandatory standards and policies relating to energy efficiency which are contained in the State energy conservation plan issued in compliance with the Energy Policy and Conservation Act (42 USC Section 6201, *et seq.*).

58. HOUSING AND URBAN DEVELOPMENT.

CONTRACTOR agrees to comply with any and all rules, regulations, guidelines, procedures and standards of the United States Department of Housing and Urban Development and complete any and all reports and forms that may be required in accordance therewith.

59. SUBCONTRACTS.

The CONTRACTOR or subcontractor will insert in any subcontracts the clauses contained in 29 CFR 5.5(a)(1) through (10) and such other clauses as HUD or its designee may by appropriate instructions require, and also a clause requiring the subcontractors to include these clauses in any lower tier subcontracts. The prime contractor shall be responsible for the compliance by any subcontractor or lower tier subcontractor with all the Agreement clauses in 29 CFR Part 5.5.

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60. CONTRACT TERMINATION; DEBARMENT.

A breach of the Agreement clauses in 29 CFR 5.5 may be grounds for termination of the Agreement, and for debarment as a contractor and a subcontractor as provided in 29 CFR 5.12.

61. COMPLAINTS, PROCEEDINGS, OR TESTIMONY BY EMPLOYEES.

No laborer or mechanic to whom the wage, salary, or other labor standards provisions of the Contract are applicable shall be discharged or in any other manner discriminated against by the CONTRACTOR or any subcontractor because such employee has filed any complaint or instituted or caused to be instituted any proceeding or has testified or is about to testify in any proceeding under or relating to the labor standards applicable under this Contract to his employer.

62. CONTRACT WORK HOURS AND SAFETY STANDARDS ACT - OVERTIME REQUIREMENTS.

- A. No CONTRACTOR or subcontractor contracting for any part of the Agreement work which may require or involve the employment of laborers or mechanics shall require or permit any such laborer or mechanic in any workweek in which he or she is employed on such work to work in excess of eight hours in any calendar day or in excess of forty hours in such workweek unless such laborer or mechanic receives compensation at a rate no less than one and one-half times the basic rate of pay for all hours worked in excess of eight hours in any calendar day or in excess of forty hours in such workweek, whichever is greater.

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B. Violation; Liability for Unpaid Wages; Liquidated Damages.

In the event of any violation of the clause set forth in subparagraph (A) of this paragraph, the CONTRACTOR and any subcontractor responsible therefor shall be liable for the unpaid wages. In addition, such CONTRACTOR and subcontractor shall be liable to the United States (in the case of work done under contract for the District of Columbia or a territory, to such District or to such territory), for liquidated damages. Such liquidated damages shall be computed with respect to each individual laborer or mechanic, including watchmen and guards, employed in violation of the clause set forth in subparagraph (A) of this paragraph, in the sum of \$10 for each calendar day on which such individual was required or permitted to work in excess of eight hours or in excess of the standard workweek of forty hours without payment of the overtime wages required by the clause set forth in subparagraph (1) of this paragraph.

63. ENTIRETY

The foregoing, and **Exhibit "A"** attached hereto, set forth the entire Agreement between the parties. No waiver or modification of this Agreement shall be valid unless in writing duly executed by both parties.

The parties acknowledge and agree that they are entering into this Agreement freely and voluntarily following extensive arm's length negotiations, and that each has had the opportunity to consult with legal counsel prior to executing this Agreement. The parties also acknowledge and agree that no representations, inducements, promises, agreements or

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warranties, oral or otherwise, have been made by that party or anyone acting on that party's behalf, which are not embodied in this Agreement, and that that party has not executed this Agreement in reliance on any representation, inducement, promise, agreement, warranty, fact or circumstance not expressly set forth in this Agreement.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by and through their authorized offices the day, month and year first above written.

CONTRACTOR

CITY OF HUNTINGTON BEACH, a municipal corporation of the State of California

By: _____

Mayor

ATTEST:

print name
ITS: (circle one) Chairman/President/Vice President

City Clerk

AND

By: _____

APPROVED AS TO FORM:

City Attorney

print name
ITS: (circle one) Secretary/Chief Financial Officer/Asst. Secretary - Treasurer

INITIATED AND APPROVED:

REVIEWED AND APPROVED:

Director of Public Works

City Administrator

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**INTENTIONALLY
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