



# City of Rialto

Council Chambers  
150 S. Palm Ave.  
Rialto, CA 92376

## Staff Report - Detailed

**File Number: 12-606**

**File ID:** 12-606

**Type:** Agreement

**Status:** Agenda Ready

**Version:** 3

**Reference:**

**In Control:** City Council

**File Created:** 04/30/2013

**File Name:**

**Final Action:**

**Title:** Request City Council approval of a Professional Services Agreement with Lockwood Engineering Company for "On-Call" Civil Engineering Plan Check and Related Services.

**Notes:**

**Agenda Date:** 05/14/2013

**Agenda Number:** TAB6

**Sponsors:**

**Enactment Date:**

**Attachments:** Attachment 1, Attachment 2, PSA - Plan Check Services v5 5-6-13

**Enactment Number:**

**Contact:**

**Hearing Date:**

**Prepared by:** mfuller@rialto.ca.gov

**Effective Date:**

### History of Legislative File

Ver- sion:	Acting Body:	Date:	Action:	Sent To:	Due Date:	Return Date:	Result:
3	City Council	05/14/2013					

### Text of Legislative File 12-606

For City Council Meeting

TO: Honorable Mayor and City Council

APPROVAL: Michael E. Story, City Administrator

FROM: Marcus L. Fuller, P.E., P.L.S., Public Works Director/City Engineer

**..Title**

Request City Council approval of a Professional Services Agreement with Lockwood Engineering Company for "On-Call" Civil Engineering Plan Check and Related Services.

**..Body**

**BACKGROUND:**

One of the important functions of the Development Services Department is to review various plans and technical studies related to City-approved private land development projects. Following the entitlement process, an owner or developer will engage its own engineering consultant to prepare the required improvement plans for on-site rough grading, precise grading/paving, on-site or off-site storm drainage improvements, public street improvements, traffic signal installation and other associated work. Often various technical studies (geotechnical/soils, hydrology/hydraulic, traffic, water quality management plans, etc.) also supplement the improvement plans for the required work.

The City Engineer must ultimately approve all on-site and off-site improvement plans (exclusive of on-site structural building plans). Since 2006, the Public Works Director has also served as the City Engineer, which created a disconnect between the technical plan check review of these items and the final approval by the City Engineer in the Public Works Department. Effective February 4, 2013 Public Works and Development Services implemented a minor reorganization, whereby the technical civil engineering plan check function was transferred from the Development Services Department to the Public Works Department, in order to improve the overall effectiveness of the plan check process. As more land development projects are approved, causing an increase in the number of plans approved and permits issued within the City, staff seeks to anticipate growing demand for timely and efficient plan checking.

**ANALYSIS/DISCUSSION:**

The Public Works Department prepared Request for Proposals No. 13-027 (the "RFP") to solicit proposals from professional firms to provide civil engineering plan check and related services to the City. The RFP was released on January 10, 2013 and proposals were due by March 7, 2013. A copy of the RFP and its addenda is included as **Attachment 1**. The City advertised the RFP in the San Bernardino County Sun newspaper on January 14 and 21, 2013 and posted it on the City's website and distributed it to various plan rooms throughout Southern California.

On February 26, 2013 the City Council appointed a subcommittee consisting of Mayor-Pro Tem Palmer and Council Member Hirtz to participate with staff on an Evaluation

Panel to review proposals received and determine the most qualified firm to provide the requested services to the City.

On March 7, 2013 the Purchasing Division received fourteen proposals in response to the RFP from the following firms (in alphabetical order):

1. Advantec Consulting Engineers; Diamond Bar, CA
2. AEI-CASC Consulting; Colton, CA
3. CivilSource, Inc.; Irvine, CA
4. Dokken Engineering; Folsom, CA
5. Engineering Resources of Southern California; Hemet, CA
6. GHD; Irvine, CA
7. Hall and Foreman, Inc.; Tustin, CA
8. Harris & Associates; Rancho Cucamonga, CA
9. Hernandez, Kroone & Associates; San Bernardino, CA
10. HR Green, Inc.; Riverside, CA
11. Lockwood Engineering Company; Rialto, CA
12. Pettit, Inc.; Corona, CA
13. Pfeiler & Associate Engineers, Inc.; Chino, CA
14. Willdan Engineering; San Bernardino, CA

In accordance with state law (California Government Code Section 4526) and Chapter 2.48.440 of the Rialto Municipal Code, City Council must make the selection for professional services on the basis of the firm's demonstrated competence and professional qualifications in accordance with specific evaluation criteria identified in the RFP; cost must not be included as criteria for rating these consultants.

The Evaluation Panel reviewed the proposals which resulted in a preliminary ranking of the firms' qualifications, establishing a "short-list" of the two most qualified firms. The firms invited for formal interviews were:

- HR Green, Inc.
- Lockwood Engineering Company

The City held formal interviews with the two firms on April 24, 2013. Members of the Evaluation Panel attended the interviews, and the consensus was that Lockwood Engineering Company ("Lockwood") was the most qualified firm, based primarily on the prior local experience in Rialto, and its ability to most effectively provide the requested plan check services for the City. A copy of the proposal submitted by Lockwood is included as **Attachment 2**.

Staff has prepared a proposed Agreement with Lockwood for the requested "on-call" civil engineering plan check and related services. The important points for City Council consideration related to the Agreement include:

- Contract Sum: Section 2.1 “Maximum Contract Amount” is written to reflect the “on-call” nature of the Agreement, in that there is no expressly defined scope of work or cost. This fact is reflected in Section 2.1 of the Agreement, which states:

*City and Consultant hereby acknowledge and agree that the scope of services required by this Agreement is subject to fluctuation due to factors controlling the pace of development within the City of Rialto beyond City’s control; and no guarantee of the volume of plan-check and related services required of Consultant under the terms of this Agreement is made by the City. The annual level of plan-check activity or related services required by this Agreement is unknown, and may significantly increase or decrease from year to year. In acknowledgement of the unknown volume of plan-check and related services required hereunder, City and Consultant hereby acknowledge and agree that there shall be no specific “Maximum Contract Sum.”*

- Contract Term: The proposed Agreement may extend to a maximum length of five years. Section 3.4 “Term” has been written to reflect an initial term of three years, with two one-year optional extensions, and states:

*The term of this Agreement shall commence on May 15, 2013. Unless earlier terminated under the terms of this Agreement, this Agreement shall continue in full force and effect until June 30, 2016. At the sole discretion of the City, upon written notice to Consultant, the term of this Agreement may be extended for two additional one-year terms. Said notice shall be delivered prior to June 30, 2017, for the initial one-year extension (if granted); and prior to June 30, 2018, for the final one-year extension (if granted).*

**ENVIRONMENTAL IMPACT:**

Engaging design professionals is not a “Project” as defined by the California Environmental Quality Act (CEQA). Pursuant to Section 15378(a), a “Project” means the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment. According to Section 15378(b), a Project does not include: (5) Organizational or administrative activities of governments that will not result in direct or indirect physical changes in the environment.

**GENERAL PLAN CONSISTENCY:**

Approval of this action complies with the following City of Rialto General Plan Goals and Policies:

- Goal 3-6: Require that all developed areas within Rialto are adequately served with essential public services and infrastructure.
- Goal 4-1: Provide transportation improvements to reduce traffic congestion associated with regional and local trip increases.
- Policy 4-1.1: Establish and maintain standards for a variety of street classifications to serve both local and regional traffic, including Major Arterial Highways, Major Arterials, Secondary Arterials, Collector Streets, and Local Streets.
- Policy 4-1.20: Design City streets so that signalized intersections operate at Level of Service (LOS) D or better during the morning and evening peak hours, and require new development to mitigate traffic impacts that degrade LOS below that level. The one exception will be Riverside Avenue south of the Metrolink tracks all the way to the City's southern border, which can operate at LOS E.
- Policy 4-1.21: Design City streets so that unsignalized intersections operate with no vehicular movement having an average delay greater than 120 seconds during the morning and evening peak hours, and require new development to mitigate traffic impacts that increase delay above that level.

**LEGAL REVIEW:**

The City Attorney has reviewed and approved the staff report and the professional services agreement.

**FINANCIAL IMPACT:**

The proposed agreement provides services to the City as an "on-call" agreement, and has no specific contract sum. The scope of services required by this Agreement will vary dependent upon the number and type of development services items requiring the Consultant's plan check services. The annual level of "on-call" plan check services required by this Agreement is unknown, and may significantly increase or decrease from year to year.

Implementation of this Agreement will be on a "pass-through" basis, whereby the City will collect plan check fees from a developer sufficient to cover the plan check fees to be paid to Lockwood. Upon receipt of payment from a developer, plan check revenues will be recognized in the Development Services Fund Account No. 710-400-4262-7629, which will offset the expenditure for plan check services to be paid from the Development Services Fund Account No. 710-500-4262-2011.

The City's currently adopted schedule of fees for civil engineering plan check services is identified in **Table 1**.

### Existing Plan Check Fee Schedule

**Table 1**

Plan Check Item	Fee	Basis	Unit
Fee is Based on Number of Lots/Parcels			
Tract Maps	\$2,951.30	Flat	5 -25 Lots
	\$67.50	Add Per Lot	> 25 Lots
Parcel Maps	\$1,363.00	Flat	2 – 4 Parcels
	\$67.50	Add Per Parcel	> 4 Parcels
Fee is Based on Estimated Value of Work			
Improvement Plans	\$1,058.80 (Flat)	Up to \$25,000	\$1 - \$25,000
	\$1,058.80	\$25,000 - \$75,000	+3% of next \$75,000
	\$3,784.90	Over \$100,000	+2% over \$100,000
Fee is Based on Volume of Earthwork in Cubic Yards (CY)			
Rough Grading Plans	\$326.80	Flat	< 100 CY
	\$326.60	Up to 1,000 CY	+ \$92.00 per 100 CY
	\$1,115.20	Up to 10,000 CY	+ \$207.80 per 1,000 CY
	\$3,976.40	Over 10,000 CY	

The plan check fees to be paid to Lockwood pursuant to the proposed Agreement are identified in **Table 2**.

### Lockwood Fee Schedule

**Table 2**

Plan Check Item	Fee and Basis
Subdivision Maps	
Tract Maps	\$3,000 per Sheet + \$100 per Lot
Parcel Maps	\$1,250 per Sheet
Plans	
Rough Grading Plan	\$1,100 per Sheet
Precise Grading/Paving Plan	\$1,300 per Sheet
Street Improvement Plan	\$800 per Sheet
Traffic Signage/Striping Plan	\$800 per Sheet
Traffic Signal Plan	\$1,250 per Sheet
Sewer Improvement Plan	\$800 per Sheet
Water Improvement Plan	\$800 per Sheet
Storm Drain Improvement Plan	\$800 per Sheet
Street Lighting/Electrical Plan	\$800 per Sheet
Landscaping Plan (Public LMD)	\$800 per Sheet
Irrigation Plan (Public LMD)	\$800 per Sheet
Revisions to Approved Plans	\$850 Flat Rate
Hydrology Studies (Preliminary Engineering)	

No Offsite Tributary Area	\$1,250 per Report
Tributary Area < 10 Acres	\$1,950 per Report
Tributary Area 10 – 100 Acres	\$2,500 per Report
Tributary Area > 100 Acres	\$3,250 per Report
Hydrology/Hydraulic Studies (Final Engineering)	
Parcel Size < 1 Acre	\$1,750 per Report
Parcel Size 1 – 5 Acres	\$2,250 per Report
Parcel Size > 5 Acres	\$3,350 per Report
Traffic Studies	
Traffic Exempt Letter	\$650 per Report
Focused Traffic Study	\$2,550 per Report
Horizon Level Traffic Study (5 mile radius)	\$3,850 per Report
Sewer Study	\$2,150 per Report
Water Quality Management Plans	
Parcel Size < 1 Acre	\$1,950 per Report
Parcel Size 1 – 5 Acres	\$2,850 per Report
Parcel Size > 5 Acres	\$3,750 per Report
Surveying Services	
Lot Line Adjustment/Parcel Mergers	\$2,250 Flat Rate
Right of Way Dedication / Vacation	\$1,250 Flat Rate
Public Easements	\$1,250 Flat Rate
Annexation to Maintenance District	\$850 Flat Rate

The City's current fee schedule for plan check services is primarily based on an estimated value of the work, which is not an adequate representation of the actual time and material costs associated with the services to be provided. Staff recommends the City's adopted fee schedule to be revised to reflect the plan check fees to be paid to Lockwood pursuant to the proposed Agreement. As part of a separate agenda item, the City Council will consider scheduling a Public Hearing for May 28, 2013 for adoption of new plan check fees shown in Table 2.

The 2013/2014 fiscal year budget will identify \$250,000 as estimated revenue to be received through plan check fees charged to developers, out of which expenditures associated with the proposed Agreement with Lockwood will be paid. Included with the estimated revenue will be 25% charged to pay for the City's administrative costs, leaving \$200,000 available to pay for the on-call plan check services anticipated in the 2013/2014 fiscal year. In this case, staff recommends that the City Council authorize an initial Purchase Order pursuant to the proposed Agreement with Lockwood for \$200,000.

As the Agreement with Lockwood will be a multi-year agreement, an initial Purchase Order will be required for each of the subsequent four fiscal years (2014/2015, 2015/2016, 2016/2017, and 2017/2018) in which the Agreement is active. Each successive fiscal year, staff will estimate plan check revenue to be received based on a review of the prior fiscal year's development activity, and will establish a corresponding

estimate of plan check expenditures. Staff recommends that the City Council delegate authority to the City Administrator to approve Initial Purchase Orders for each of the four subsequent fiscal years in which the Agreement is active, corresponding to the approved plan check expenditure budget approved by the City Council.

In the event the level of economic activity improves, and plan check fee revenue exceeds staff's estimate, it will be necessary for staff to coordinate budget adjustments to reflect the increased revenue and corresponding increased expenditure to accommodate the higher level of plan check services required. In this case, staff recommends that the City Council delegate authority to the Administrative and Community Services Director to record internal budget adjustments to reflect increased plan check revenue in Development Services Fund Account No. 710-400-4262-7629 and corresponding increased plan check expenditures in Development Services Fund Account No. 710-500-4262-2011. Finally, staff recommends that the City Council delegate authority to the City Administrator to authorize increases to the annual Purchase Orders for plan check services pursuant to the Agreement with Lockwood, corresponding to the increased level of plan check activity reflected by internal budget adjustments.

**RECOMMENDATION:**

Staff recommends that the City Council:

- Approve the Professional Services Agreement with Lockwood Engineering Company for "On-Call" Civil Engineering Plan Check and Related Services, as a multi-year agreement established with no maximum contract sum, consisting of an initial three-year term subject to two one-year extensions.
- Authorize the City Administrator to approve each of the two one-year extensions of the Professional Services Agreement with Lockwood Engineering Company for "On-Call" Civil Engineering Plan Check and Related Services.
- Authorize the issuance of an Initial Purchase Order to Lockwood Engineering Company in the amount of \$200,000 for the 2013/2014 fiscal year.
- Delegate authority to the City Administrator to approve Purchase Orders to Lockwood Engineering Company for the fiscal years 2014/2015, 2015/2016 (and 2016/2017, 2017/2018, if extensions approved) to correspond to the plan check expenditure budget in Development Services Fund Account No. 710-500-4262-2011 adopted by the City Council.
- Authorize the Administrative and Community Services Director (or his designee), for the fiscal years 2013/2014 through 2017/2018 (assuming approval of extensions), to record internal budget adjustments for plan check revenue received in excess of the initial budget adopted by the City Council in Development Services Fund Account No. 710-400-4262-7629, and for a corresponding plan check expenditure in excess of the initial budget adopted by the City Council in Development Services Fund Account No. 710-500-4262-2011.
- Delegate authority to the City Administrator to authorize increases to the Purchase Orders to Lockwood Engineering Company for the fiscal years 2013/2014 through 2017/2018 (assuming approval of extensions) to correspond to increased plan check



expenditure budget that may be recorded in Development Services Fund Account No. 710-500-4262-2011.

**CITY OF RIALTO  
PROFESSIONAL SERVICES AGREEMENT  
FOR  
"ON CALL" CIVIL ENGINEERING PLAN CHECK & RELATED SERVICES**

THIS PROFESSIONAL SERVICES AGREEMENT (hereinafter "Agreement") is made and entered into, to be effective this 14th day of May, 2013, by and between the CITY OF RIALTO, a California municipal corporation, (hereinafter referred to as "City") and LOCKWOOD ENGINEERING COMPANY, a sole proprietorship, (hereinafter referred to as "Consultant"). City and Consultant are sometimes hereinafter individually referred to as "Party" and are hereinafter collectively referred to as the "Parties."

**RECITALS**

- A. City has determined that there is a need for "on call" civil engineering plan check and related services for various projects throughout the City, (hereinafter the "Project").
- B. Consultant has submitted to City a proposal to provide "on call" civil engineering plan check and related services for various projects throughout the City pursuant to the terms of this Agreement.
- C. Consultant is qualified by virtue of its experience, training, education, reputation, and expertise to provide these services and has agreed to provide such services as provided herein.
- D. City desires to retain Consultant to provide such professional services.

NOW, THEREFORE, in consideration of the promises and mutual obligations, covenants, and conditions contained herein, and other valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

**1.0 SERVICES OF CONTRACTOR**

**1.1 Scope of Services.** In compliance with all terms and conditions of this Agreement, Consultant agrees to perform the professional services set forth in the Scope of Services described in Exhibit "A," which is attached hereto and is incorporated herein by reference (hereinafter referred to as the "Scope of Services"). As a material inducement to the City entering into this Agreement, Consultant represents and warrants that Consultant is a provider of first class work and professional services and that Consultant is experienced in performing the Scope of Services contemplated herein and, in light of such status and experience, Consultant covenants that it shall follow the highest professional standards in performing the Scope of Services required hereunder. For purposes of this Agreement, the phrase "highest professional standards" shall mean those standards of practice recognized as high quality among well-qualified and experienced professionals performing similar work under similar circumstances.

**1.2 Contract Documents.** The Agreement between the Parties shall consist of the following: (1) this Agreement; (2) the Scope of Services; (3) the City's Request for Proposals; and, (4) the Consultant's signed, original proposal submitted to the City ("Consultant's Proposal"), (collectively referred to as the "Contract Documents"). The City's Request for Proposals and the Consultant's Proposal, which are both attached as Exhibits "B" and "C", respectively, are incorporated by reference and are made a part of this Agreement. The Scope of Services shall include the Consultant's Proposal. All provisions of the Scope of Services, the City's Request for Proposals and the Consultant's Proposal shall be binding on the Parties. Should any conflict or inconsistency exist in the Contract Documents, the conflict or inconsistency shall be resolved by applying the provisions in the highest priority document, which shall be determined in the following order of priority: (1st) the provisions of the Scope of Services (Exhibit "A"); (2nd) the provisions of the City's Request for Proposal (Exhibit "B"); (3rd) the terms of this Agreement; and, (4th) the provisions of the Consultant's Proposal (Exhibit "C").

**1.3 Compliance with Law.** Consultant warrants that all Services rendered hereunder shall be performed in accordance with all applicable federal, state, and local laws, statutes, and ordinances and all lawful orders, rules, and regulations promulgated thereunder.

**1.4 Licenses, Permits, Fees and Assessments.** Consultant represents and warrants to City that it has obtained all licenses (including a City Business License), permits, qualifications, and approvals of whatever nature that are legally required to practice its profession and perform the Scope of Services required by this Agreement. Consultant represents and warrants to City that Consultant shall, at its sole cost and expense, keep in effect at all times during the term of this Agreement, any license, permit, qualification, or approval that is legally required for Consultant to perform the Scope of Services under this Agreement. Consultant shall have the sole obligation to pay for any fees, assessments, and taxes, plus applicable penalties and interest, which may be imposed by law and arise from or are necessary for the Consultant's performance of the Scope of Services required by this Agreement, and shall indemnify, defend, and hold harmless City against any such fees, assessments, taxes penalties, or interest levied, assessed, or imposed against City hereunder.

**1.5 Familiarity with Work.** By executing this Agreement, Consultant warrants that Consultant (a) has thoroughly investigated and considered the Scope of Services to be performed, (b) has carefully considered how the Services should be performed, and (c) fully understands the facilities, difficulties, and restrictions attending performance of the Services under this Agreement. If the Services involve work upon any site, Consultant warrants that Consultant has or will investigate the site and is or will be fully acquainted with the conditions there existing, prior to commencement of any Services hereunder. Should the Consultant discover any latent or unknown conditions that will materially affect the performance of the Services hereunder, Consultant shall immediately inform the City of such fact and shall not proceed except at Consultant's risk until written instructions are received from the City.

**1.6 Care of Work.** Consultant shall adopt reasonable methods during the term of the Agreement to furnish continuous protection to any site where the Scope of Services are performed and the equipment, materials, papers, documents, plans, studies, and/or other components thereof to prevent losses or damages, and shall be responsible for all such



damages, to persons or property, until acceptance of the Scope of Services by the City, except such losses or damages as may be caused by City's own negligence.

**1.7 Further Responsibilities of Parties.** Both Parties agree to use reasonable care and diligence to perform their respective obligations under this Agreement. Both Parties agree to act in good faith to execute all instruments, prepare all documents, and take all actions as may be reasonably necessary to carry out the purposes of this Agreement.

## **2.0 COMPENSATION**

**2.1 Maximum Contract Amount.** City and Consultant hereby acknowledge and agree that the Scope of Services required by this Agreement is subject to fluctuation due to factors controlling the pace of development within the City of Rialto beyond City's control; and no guarantee of the volume of plan-check and related services required of Consultant under the terms of this Agreement is made by the City. The annual level of plan-check activity or related services required by this Agreement is unknown, and may significantly increase or decrease from year to year. In acknowledgement of the unknown volume of plan-check and related services required hereunder, City and Consultant hereby acknowledge and agree that the "Maximum Contract Sum" will be limited to the budget established by the City Council and the total collective sum of individual Purchase Orders issued to Consultant pursuant to and during the term of this Agreement. For the services rendered pursuant to this Agreement, the Consultant shall be compensated in accordance with the "Schedule of Compensation" attached hereto as Exhibit "D" and incorporated herein by this reference. *despite*

The method of compensation may include: (i) a lump sum payment upon completion, (ii) payment for time and materials based upon the Consultant's Schedule of Hourly Billing Rates as shown on Exhibit "D-1", or (iii) such other methods as may be specified in the Schedule of Compensation. Compensation shall include reimbursement for actual and necessary expenditures for reproduction costs, telephone expense, transportation expense, and all other necessary expenditures required to perform the professional services under this Agreement. Compensation shall include the attendance of Consultant at all project meetings reasonably deemed necessary by the City; Consultant shall not be entitled to any additional compensation for attending said meetings unless otherwise allowed therefore pursuant to Exhibit "D". Consultant hereby acknowledges that it accepts the risk that the services to be provided pursuant to the Scope of Services may be more costly or time consuming than Consultant anticipates, and that Consultant shall not be entitled to additional compensation therefore.

It is expressly agreed that the maximum contract amount of this Agreement is undefined, subject to the volume of plan-check and related services required throughout the duration of the term of this Agreement. It is further expressly agreed that for "on-call" plan check services this Agreement shall operate on a "pass-through" basis, with plan check fees collected by the City from a developer in accordance with the City of Rialto Fee Schedule, and/or on the basis of the Schedule of Hourly Billing Rates attached hereto as Exhibit "D-1" (as may be increased pursuant to the terms of this Agreement) for professional services rendered on the basis of time and materials. In no case shall Consultant be entitled to compensation unless or until the City has received payment from the developer for the required services or costs. The term "developer" used herein shall be considered to include the owner, lessee, authorized agent or other designated party proposing development of private or public property within the City of



Rialto, and may consist of a private individual, company, corporation, or other legally recognized entity; and further, may include a professional consultant hired by the developer to perform design services on their behalf associated with the proposed development.

**2.2 Method of Payment.** Unless some other method of payment is specified in the Schedule of Compensation (Exhibit "D"), in any month in which Consultant wishes to receive payment, no later than the tenth (10) working day of such month, Consultant shall submit to the City, in a form approved by the Contract Officer, an invoice for services rendered prior to the date of the invoice. Such requests shall be based upon the amount and value of the services performed by Consultant and accompanied by such reporting data including an itemized breakdown of all costs incurred and tasks performed during the period covered by the invoice, as may be required by the City. City shall use reasonable efforts to make payments to Consultant within thirty (30) days after receipt of the invoice or a soon thereafter as is reasonably practical. There shall be a maximum of one payment per month.

**2.3 Changes in Scope.** In the event any change or changes in the Scope of Services is requested by the City or Consultant, the Parties shall execute a written amendment to this Agreement, setting forth with particularity all terms of such amendment, including, but not limited to, any additional professional fees. An amendment shall be entered into: (a) to provide for revisions or modifications to documents or other work product or work when documents or other work product or work is required by the enactment or revision of law subsequent to the preparation of any documents, other work product, or work; and/or (b) to provide for additional services not included in this Agreement or not customarily furnished in accordance with generally accepted practice in Consultant's profession.

**2.4 Appropriations.** This Agreement is subject to and contingent upon funds being appropriated therefore by the Rialto City Council for each fiscal year covered by the Agreement. If such appropriations are not made, this Agreement shall automatically terminate without penalty to the City.

### **3. SCHEDULE OF PERFORMANCE**

**3.1 Time of Essence.** Time is of the essence in the performance of this Agreement. The time for completion of the services to be performed by Consultant is an essential condition of this Agreement. Consultant shall prosecute regularly and diligently the Scope of Services of this Agreement according to the agreed upon Schedule of Performance (Exhibit "E").

**3.2 Schedule of Performance.** Consultant shall commence the Services pursuant to this Agreement upon receipt of a written notice to proceed given by the City, and shall perform the Scope of Services within the time period(s) established in the Schedule of Performance, which is attached hereto as Exhibit "E" and is incorporated herein by reference.

**3.3 Force Majeure.** The time period(s) specified in the Schedule of Performance for performance of the Services rendered pursuant to this Agreement shall be extended because of any delays due to unforeseeable causes beyond the control and without the fault or negligence of the Consultant (financial inability excepted), including, but not limited to, acts of God or of the public enemy, unusually severe weather, fires, earthquakes, floods, epidemics, quarantine restrictions, riots, strikes, freight embargoes, wars, and/or acts of any governmental

agency, including the City, if Consultant, within ten (10) days of the commencement of such delay, notifies the City Administrator in writing of the causes of the delay. The City Administrator shall ascertain the facts and the extent of delay, and extend the time for performing the Services for the period of the enforced delay when and if in the judgment of the City Administrator such delay is justified. The City Administrator's determination shall be final and conclusive upon the Parties to this Agreement. In no event shall Consultant be entitled to recover damages against the City for any delay in the performance of this Agreement, however caused, Consultant's sole remedy being extension of the Agreement pursuant to this section.

**3.4 Term.** The term of this Agreement shall commence on May 15, 2013. Unless earlier terminated under the terms of this Agreement, this Agreement shall continue in full force and effect until June 30, 2016. At the sole discretion of the City Administrator, upon written notice to Consultant, the term of this Agreement may be extended for two (2) additional one (1) year terms on the same terms and conditions as contained herein without any further signature of the parties to effectuate any such extension. Said notice shall be delivered prior to June 30, 2016, for the initial one (1) year extension (if granted by the City Administrator); and prior to June 30, 2017, for the final one (1) year extension (if granted by the City Administrator).

**3.5 Termination Prior to Expiration of Term.** City may terminate this Agreement for its convenience at any time, without cause, in whole or in part, upon giving Consultant thirty (30) days written notice. Where termination is due to the fault of Consultant and constitutes an immediate danger to health, safety, and general welfare, the period of notice shall be such shorter time as may be determined by the City. Upon such notice, City shall pay Consultant for Services performed through the date of termination. Upon receipt of such notice, Consultant shall immediately cease all work under this Agreement, unless stated otherwise in the notice or by written authorization of the Contract Officer. After such notice, Consultant shall have no further claims against the City under this Agreement. Upon termination of the Agreement under this section, Consultant shall submit to the City an invoice for work and services performed prior to the date of termination. Consultant may terminate this Agreement, with or without cause, upon sixty (60) days written notice to the City, except that where termination is due to material default by the City, the period of notice may be such shorter time as the Consultant may determine.

#### **4. COORDINATION OF WORK**

**4.1 Representative of Consultant.** The following representative of Consultant is hereby designated as being the main point of contact of Consultant authorized to act in its behalf with respect to the Services to be performed under this Agreement and make all decisions in connection therewith: Carleton Lockwood, Jr., P.E., P.L.S. It is expressly understood that the experience, knowledge, education, capability, expertise, and reputation of the foregoing representative is a substantial inducement for City to enter into this Agreement. Therefore, the foregoing representative shall be responsible during the term of this Agreement for directing all activities of Consultant and devoting sufficient time to personally supervise the services performed hereunder. The foregoing representative may not be changed by Consultant without prior written approval of the Contract Officer.

**4.2 Contract Officer.** The Contract Officer shall be such person as may be designated by the City Administrator of City, and is subject to change by the City Administrator. It shall be the Consultant's responsibility to ensure that the Contract Officer is kept fully informed of the progress of the performance of the Services, and the Consultant shall refer any decisions which must be made by City to the Contract Officer. Unless otherwise specified herein, any approval of City required hereunder shall mean the approval of the Contract Officer. The Contract Officer shall have authority to sign all documents on behalf of the City required hereunder to carry out the terms of this Agreement.

**4.3 Prohibition Against Subcontracting or Assignments.** The experience, knowledge, capability, expertise, and reputation of Consultant, its principals and employees, were a substantial inducement for City to enter into this Agreement. Therefore, Consultant shall not assign the performance of this Agreement, nor any part thereof, nor any monies due hereunder, voluntarily or by operation of law, without the prior written consent of City. Consultant shall not contract with any other entity to perform the Services required under this Agreement without the prior written consent of City. If Consultant is permitted to subcontract any part of this Agreement by City, Consultant shall be responsible to City for the acts and omissions of its subcontractor(s) in the same manner as it is for persons directly employed. Nothing contained in this Agreement shall create any contractual relationships between any subcontractor and City. All persons engaged in the Scope of Services will be considered employees of Consultant. City will deal directly with and will make all payments to Consultant. In addition, neither this Agreement nor any interest herein may be transferred, assigned, conveyed, hypothecated, or encumbered voluntarily or by operation of law, whether for the benefit of creditors or otherwise, without the prior written consent of City. Transfers restricted hereunder shall include the transfer to any person or group of persons acting in concert of more than twenty five percent (25%) of the present ownership and/or control of Consultant, taking all transfers into account on a cumulative basis. In the event of any such unapproved transfer, including any bankruptcy proceeding, this Agreement shall be void. No approved transfer shall release Consultant or any surety of Consultant from any liability hereunder without the express written consent of City.

**4.4 Independent Contractor.**

A. The legal relationship between the Parties is that of an independent contractor, and nothing herein shall be deemed to make Consultant a City employee. During the performance of this Agreement, Consultant and its officers, employees, and agents shall act in an independent capacity and shall not act as City officers or employees. The personnel performing the Services under this Agreement on behalf of Consultant shall at all times be under Consultant's exclusive direction and control. Neither City nor any of its officers, employees, or agents shall have control over the conduct of Consultant or any of its officers, employees, or agents, except as set forth in this Agreement. Consultant, its officers, employees, or agents shall not maintain an office or any other type of fixed business location at City's offices. City shall have no voice in the selection, discharge, supervision, or control of Consultant's employees, servants, representatives, or agents, or in fixing their number, compensation, or hours of service. Consultant shall pay all wages, salaries, and other amounts due its employees in connection with this Agreement and shall be responsible for all reports and obligations respecting them, including but not limited to social security income tax withholding, unemployment compensation, workers' compensation, and other similar matters.

City shall not in any way or for any purpose be deemed to be a partner of Consultant in its business or otherwise a joint venturer or a member of any joint enterprise with Consultant.

B. Consultant shall not incur or have the power to incur any debt, obligation, or liability against City, or bind City in any manner.

C. No City benefits shall be available to Consultant, its officers, employees, or agents in connection with any performance under this Agreement. Except for professional fees paid to Consultant as provided for in this Agreement, City shall not pay salaries, wages, or other compensation to Consultant for the performance of the Scope of Services under this Agreement. City shall not be liable for compensation or indemnification to Consultant, its officers, employees, or agents, for injury or sickness arising out of performing the Scope of Services hereunder.

## **5. INSURANCE**

**5.1 Types of Insurance.** Consultant shall procure and maintain, at its sole cost and expense, in a form and content satisfactory to City, the insurance described herein for the duration of this Agreement, including any extension thereof, or as otherwise specified herein, against claims which may arise from or in connection with the performance of the Scope of Services hereunder by Consultant, its agents, representatives, or employees. In the event the City Administrator determines that the Scope of Services to be performed under this Agreement creates an increased or decreased risk of loss to the City, the Consultant agrees that the minimum limits of the insurance policies may be changed accordingly upon receipt of written notice from the City Administrator or his designee. Consultant shall immediately substitute any insurer whose A.M. Best rating drops below the levels specified herein. Except as otherwise authorized below for professional liability (errors and omissions) insurance, all insurance provided pursuant to this Agreement shall be on an occurrence basis. The minimum amount of insurance required hereunder shall be as follows:

A. **Errors and Omissions Insurance.** Consultant shall obtain and maintain in full force and effect throughout the term of this Agreement, standard industry form professional liability (errors and omissions) insurance coverage in an amount of not less than one million dollars (\$1,000,000.00) per occurrence in accordance with the provisions of this section.

(1) Consultant shall either: (a) certify in writing to the City that Consultant is unaware of any professional liability claims made against Consultant and is unaware of any facts which may lead to such a claim against Consultant; or (b) if Consultant does not provide the certification pursuant to (a), Consultant shall procure from the professional liability insurer an endorsement providing that the required limits of the policy shall apply separately to claims arising from errors and omissions in the rendition of services pursuant to this Agreement.

(2) If the policy of insurance is written on a "claims made" basis, the policy shall be continued in full force and effect at all times during the term of this Agreement, and for a period of three (3) years from the date of the completion of the Services provided hereunder. In the event of termination of the policy during this period, Consultant shall obtain continuing insurance coverage for the prior acts or omissions of Consultant during the course of performing Services under the terms of this Agreement. The coverage shall be evidenced by



either a new policy evidencing no gap in coverage, or by obtaining separate extended "tail" coverage with the present or new carrier or other insurance arrangements providing for complete coverage, either of which shall be subject to the written approval by the City Administrator.

(3) In the event the policy of insurance is written on an "occurrence" basis, the policy shall be continued in full force and effect during the term of this Agreement, or until completion of the Services provided for in this Agreement, whichever is later. In the event of termination of the policy during this period, new coverage shall immediately be obtained to ensure coverage during the entire course of performing the Services under the terms of this Agreement.

B. Workers' Compensation Insurance. Consultant shall obtain and maintain, in full force and effect throughout the term of this Agreement, workers' compensation insurance in at least the minimum statutory amounts, and in compliance with all other statutory requirements, as required by the State of California. Consultant agrees to waive and obtain endorsements from its workers' compensation insurer waiving subrogation rights under its workers' compensation insurance policy against the City and to require each of its subcontractors, if any, to do likewise under their workers' compensation insurance policies. If Consultant has no employees, Consultant shall complete the City's Request for Waiver of Workers' Compensation Insurance Requirement form.

C. Commercial General Liability Insurance. Consultant shall obtain and maintain, in full force and effect throughout the term of this Agreement, a policy of commercial general liability insurance written on a per occurrence basis with a combined single limit of at least one million dollars (\$1,000,000.00) and two million dollars (\$2,000,000.00) general aggregate for bodily injury and property damage including coverages for contractual liability, personal injury, independent contractors, broad form property damage, products and completed operations.

D. Business Automobile Insurance. Consultant shall obtain and maintain, in full force and effect throughout the term of this Agreement, a policy of business automobile liability insurance written on a per occurrence basis with a single limit liability in the amount of one million dollars (\$1,000,000.00) bodily injury and property damage. The policy shall include coverage for owned, non-owned, leased, and hired cars.

E. Employer Liability Insurance. Consultant shall obtain and maintain, in full force and effect throughout the term of this Agreement, a policy of employer liability insurance written on a per occurrence basis with a policy limit of at least one million dollars (\$1,000,000.00) for bodily injury or disease.

**5.2 Deductibles and Self-Insured Retentions.** Any deductibles or self-insured retentions must be declared to and approved by the City Administrator prior to commencing any work or services under this Agreement. Consultant guarantees payment of all deductibles and self-insured retentions. City reserves the right to reject deductibles or self-insured retentions in excess of \$10,000, and the City Administrator may require evidence of pending claims and claims history as well as evidence of Consultant's ability to pay claims for all deductible amounts and self-insured retentions proposed in excess of \$10,000.

**5.3 Other Insurance Requirements.** The following provisions shall apply to the insurance policies required of Consultant pursuant to this Agreement:

- 5.3.1 For any claims related to this Agreement, Consultant's General Liability coverage shall be primary insurance as respects City and its officers, council members, officials, employees, agents, and volunteers. Any insurance or self-insurance maintained by the City and its officers, council members, officials, employees, agents, and volunteers shall be in excess of Consultant's insurance and shall not contribute with it.
- 5.3.2 Any failure to comply with reporting or other provisions of the policies, including breaches of warranties, shall not affect coverage provided to City and its officers, council members, officials, employees, agents, and volunteers.
- 5.3.3 All General Liability insurance coverage and limits provided by Consultant and available or applicable to this Agreement are intended to apply to each insured, including additional insureds, against whom a claim is made or suit is brought to the full extent of the policies. Nothing contained in this Agreement or any other agreement relating to the City or its operations shall limit the application of such insurance coverage.
- 5.3.4 None of the insurance coverages required herein will be in compliance with these requirements if they include any limiting endorsement which substantially impairs the coverages set forth herein (e.g., elimination of contractual liability or reduction of discovery period), unless the endorsement has first been submitted to the City Administrator and approved in writing.
- 5.3.5 Consultant agrees to require its insurer to modify insurance endorsements to delete any exculpatory wording stating that failure of the insurer to mail written notice of cancellation imposes no obligation, or that any party will "endeavor" (as opposed to being required) to comply with the requirements of the endorsements. Certificates of insurance will not be accepted in lieu of required endorsements, and submittal of certificates without required endorsements may delay commencement of the Project. It is Consultant's obligation to ensure timely compliance with all insurance submittal requirements as provided herein.
- 5.3.6 Consultant agrees to ensure that subcontractors, and any other parties involved with the Project who are brought onto or involved in the Project by Consultant, provide the same minimum insurance coverage required of Consultant. Consultant agrees to monitor and review all such coverage and assumes all responsibility for ensuring that such coverage is provided in conformity with the requirements of this section. Consultant agrees that upon request, all agreements with subcontractors and others engaged in the Project will be submitted to the City for review.
- 5.3.7 Consultant acknowledges and agrees that any actual or alleged failure on the part of the City to inform Consultant of non-compliance with any insurance

requirement in no way imposes any additional obligations on the City nor does it waive any rights hereunder in this or any other regard.

- 5.3.8 Consultant shall provide proof that policies of insurance required herein expiring during the term of this Agreement have been renewed or replaced with other policies providing at least the same coverage. Proof that such coverage has been ordered shall be submitted prior to expiration. Endorsements as required in this Agreement applicable to the renewing or new coverage shall be provided to City no later than ten (10) days prior to expiration of the lapsing coverage.
- 5.3.9 Requirements of specific insurance coverage features or limits contained in this section are not intended as limitations on coverage, limits, or other requirements nor as a waiver of any coverage normally provided by any given policy. Specific reference to a given coverage feature is for purposes of clarification only as it pertains to a given issue, and is not intended by any party or insured to be limiting or all-inclusive.
- 5.3.10 The requirements in this section supersede all other sections and provisions of this Agreement to the extent that any other section or provision conflicts with or impairs the provisions of this section.
- 5.3.11 Consultant agrees to provide immediate notice to City of any claim or loss against Consultant arising out of the Scope of Services performed under this Agreement and for any other claim or loss which may reduce the insurance available to pay claims arising out of this Agreement. City assumes no obligation or liability by such notice, but has the right (but not the duty) to monitor the handling of any such claim or claims if they are likely to involve City, or to reduce or dilute insurance available for payment of potential claims.
- 5.3.12 Consultant agrees that the provisions of this section shall not be construed as limiting in any way the extent to which the Consultant may be held responsible for the payment of damages resulting from the Consultant's activities or the activities of any person or person for which the Consultant is otherwise responsible.

**5.4 Sufficiency of Insurers.** Insurance required herein shall be provided by authorized insurers in good standing with the State of California. Coverage shall be provided by insurers admitted in the State of California with an A.M. Best's Key Rating of B++, Class VII, or better, unless such requirements are waived in writing by the City Administrator or his designee due to unique circumstances.

**5.5 Verification of Coverage.** Consultant shall furnish City with both certificates of insurance and endorsements, including additional insured endorsements, affecting all of the coverages required by this Agreement. The certificates and endorsements are to be signed by a person authorized by that insurer to bind coverage on its behalf. All proof of insurance is to be received and approved by the City before work commences. City reserves the right to require Consultant's insurers to provide complete, certified copies of all required insurance policies at any time. Additional insured endorsements are not required for Errors and

Omissions and Workers' Compensation policies.

Verification of Insurance coverage may be provided by: (1) an approved General and/or Auto Liability Endorsement Form for the City of Rialto or (2) an acceptable Certificate of Liability Insurance Coverage with an approved Additional Insured Endorsement with the following endorsements stated on the certificate:

1. *"The City of Rialto, its officials, employees, and agents are named as an additional insured..." ("as respects City of Rialto Contract No.\_\_\_\_" or "for any and all work performed with the City" may be included in this statement).*

2. *"This General Liability insurance is primary and non-contributory over any insurance or self-insurance the City may have..." ("as respects City of Rialto Contract No.\_\_\_\_" or "for any and all work performed with the City" may be included in this statement).*

3. *"Should any of the above described policies be canceled before the expiration date thereof, the issuing company will mail 30 days written notice to the Certificate Holder named." Language such as, "endeavor to" mail and "but failure to mail such notice shall impose no obligation or liability of any kind upon the company, its agents or representative" is not acceptable and must be crossed out.*

4. Both the Workers' Compensation and Employers' Liability policies shall contain the insurer's waiver of subrogation in favor of City, its elected officials, officers, employees, agents, and volunteers.

In addition to the endorsements listed above, the City of Rialto shall be named the certificate holder on the policies. All certificates of insurance and endorsements are to be received and approved by the City before work commences. All certificates of insurance must be authorized by a person with authority to bind coverage, whether that is the authorized agent/broker or insurance underwriter. Failure to obtain the required documents prior to the commencement of work shall not waive the Consultant's obligation to provide them.

## **6. INDEMNIFICATION**

To the fullest extent permitted by law, Consultant shall indemnify, defend (at Consultant's sole cost and expense), protect and hold harmless City and its officers, council members, officials, employees, agents and volunteers and all other public agencies whose approval of the Project is required, (individually "Indemnified Party"; collectively "Indemnified Parties") against any and all liabilities, claims, judgments, arbitration awards, settlements, costs, demands, orders, and penalties (collectively "Claims"), including but not limited to Claims arising from injuries or death of persons (Consultant's employees included) and damage to property, which Claims arise out of, pertain to, or are related to the negligence, recklessness, or willful misconduct of Consultant, its agents, employees, or subcontractors, or arise from Consultant's negligent, reckless, or willful performance of or failure to perform any term, provision, covenant, or condition of this Agreement ("Indemnified Claims"), but Consultant's liability for Indemnified Claims shall be reduced to the extent such Claims arise from the negligence, recklessness, or willful misconduct of the City, its officers, council members, officials, employees, or agents.

Consultant shall reimburse the Indemnified Parties for any reasonable expenditures, including reasonable attorneys' fees, expert fees, litigation costs, and expenses that each Indemnified Party may incur by reason of Indemnified Claims. Upon request by an Indemnified Party, Consultant shall defend with legal counsel reasonably acceptable to the Indemnified Party all Claims against the Indemnified Party that may arise out of, pertain to, or relate to Indemnified Claims, whether or not Consultant is named as a party to the Claim proceeding. The determination whether a Claim "may arise out of, pertain to, or relate to Indemnified Claims" shall be based on the allegations made in the Claim and the facts known or subsequently discovered by the Parties. In the event a final judgment, arbitration award, order, settlement, or other final resolution expressly determines that Claims did not arise out of, pertain to, nor relate to the negligence, recklessness, or willful misconduct of Consultant to any extent, then City shall reimburse Consultant for the reasonable costs of defending the Indemnified Parties against such Claims, except City shall not reimburse Consultant for attorneys' fees, expert fees, litigation costs, and expenses that were incurred defending Consultant or any parties other than Indemnified Parties against such Claims.

Consultant's indemnification obligation hereunder shall survive the expiration or earlier termination of this Agreement until all actions against the Indemnified Parties for such matters indemnified hereunder are fully and finally barred by the applicable statute of limitations or, if an action is timely filed, until such action is final. This provision is intended for the benefit of third party Indemnified Parties not otherwise a party to this Agreement.

## **7. REPORTS AND RECORDS**

**7.1 Accounting Records.** Consultant shall keep complete, accurate, and detailed accounts of all time, costs, expenses, and expenditures pertaining in any way to this Agreement. Consultant shall keep such books and records as shall be necessary to properly perform the Services required by this Agreement and to enable the Contract Officer to evaluate the performance of such Services. The Contract Officer shall have full and free access to such books and records at all reasonable times, including the right to inspect, copy, audit, and make records and transcripts from such records.

**7.2 Reports.** Consultant shall periodically prepare and submit to the Contract Officer such reports concerning the performance of the Services required by this Agreement as the Contract Officer shall require. Consultant hereby acknowledges that the City is greatly concerned about the cost of the Scope of Services to be performed pursuant to this Agreement. For this reason, Consultant agrees that if Consultant becomes aware of any facts, circumstances, techniques, or events that may or will materially increase or decrease the cost of the Scope of Services contemplated herein or, if Consultant is providing design services, the cost of the project being designed, Consultant shall promptly notify the Contract Officer of such fact, circumstance, technique, or event and the estimated increased or decreased cost related thereto and, if Consultant is providing design services, the estimated increased or decreased cost estimate for the project being designed.

**7.3 Ownership of Documents.** All drawings, specifications, reports, records, documents, memoranda, correspondence, computations, and other materials prepared by Consultant, its employees, subcontractors, and agents in the performance of this Agreement

shall be the property of City and shall be promptly delivered to City upon request of the Contract Officer or upon the termination of this Agreement, and Consultant shall have no claim for further employment or additional compensation as a result of the exercise by City of its full rights of ownership of the documents and materials hereunder. Any use of such completed documents for other projects and/or use of incomplete documents without specific written authorization by the Consultant will be at the City's sole risk and without liability to Consultant, and the City shall indemnify the Consultant for all damages resulting therefrom. Consultant may retain copies of such documents for its own use. Consultant shall have an unrestricted right to use the concepts embodied therein. Consultant shall ensure that all its subcontractors shall provide for assignment to City of any documents or materials prepared by them, and in the event Consultant fails to secure such assignment, Consultant shall indemnify City for all damages resulting therefrom.

**7.4 Release of Documents.** All drawings, specifications, reports, records, documents, and other materials prepared by Consultant in the performance of services under this Agreement shall not be released publicly without the prior written approval of the Contract Officer. All information gained by Consultant in the performance of this Agreement shall be considered confidential and shall not be released by Consultant without City's prior written authorization.

**7.5 Audit and Inspection of Records.** After receipt of reasonable notice and during the regular business hours of City, Consultant shall provide City, or other agents of City, such access to Consultant's books, records, payroll documents, and facilities as City deems necessary to examine, copy, audit, and inspect all accounting books, records, work data, documents, and activities directly related to Consultant's performance under this Agreement. Consultant shall maintain such books, records, data, and documents in accordance with generally accepted accounting principles and shall clearly identify and make such items readily accessible to such parties during the term of this Agreement and for a period of three (3) years from the date of final payment by City hereunder.

## **8. ENFORCEMENT OF AGREEMENT**

**8.1 California Law and Venue.** This Agreement shall be construed and interpreted both as to validity and as to performance of the Parties in accordance with the laws of the State of California.

**8.2 Disputes.** Except as otherwise provided in this Agreement, any dispute concerning a question of fact arising under this Agreement which is not disposed of by agreement of the Parties shall be presented to the City Administrator or his authorized representative by the Consultant's provision of a letter or other writing setting forth the general nature of the dispute, the disputed facts believed to be true by the Consultant, the relevance of those facts to the dispute in question, and a statement that the dispute is being submitted to the City Administrator or his authorized representative pursuant to this Section 8.2 of this Agreement. Upon receipt of any notice of a disputed fact as provided immediately above, the City Administrator or his authorized representative shall set a hearing to be conducted within thirty (30) days and shall direct the head of the department having the most knowledge concerning the dispute to assemble the City's position with respect to the matters set forth in the notice of dispute. At the hearing, the Consultant and the City Department Head, or their

attorneys, shall have the right to call and examine such witnesses as shall have knowledge of the facts relevant to the matter in dispute. All witnesses shall be sworn under oath and the hearing before the City Administrator shall be transcribed by a court reporter. The costs of the court reporter shall be split equally between the Consultant and the City. The hearing before the City Administrator or his authorized representative may be continued from time to time as necessary to elicit all relevant evidence with regard to the disputed fact. Within thirty (30) days of the close of the hearing, the City Administrator or his authorized representative shall issue his or her written decision and mail the same to the Consultant. The decision of the City Administrator or his authorized representative shall be conclusive.

This Section 8.2 does not preclude consideration of questions of law in connection with decisions provided for herein. Nothing in this agreement, however, shall be construed as making the final decision of any administrative official representative or board on the question of law. Nothing in this Section 8.2 shall prohibit the City from terminating this Agreement pursuant to Section 3.5 of this Agreement.

**8.3 Interpretation.** This Agreement shall be construed as a whole according to its fair language and common meaning to achieve the objectives and purposes of the Parties. The terms of this Agreement are contractual and the result of negotiation between the Parties. Accordingly, any rule of construction of contracts (including, without limitation, California Civil Code Section 1654) that ambiguities are to be construed against the drafting party, shall not be employed in the interpretation of this Agreement. The caption headings of the various sections and paragraphs of this Agreement are for convenience and identification purposes only and shall not be deemed to limit, expand, or define the contents of the respective sections or paragraphs.

**8.4 Default of Consultant.**

A. Consultant's failure to comply with any provision of this Agreement shall constitute a default.

B. If the City Administrator, or his designee, determines that Consultant is in default in the performance of any of the terms or conditions of this Agreement, he/she shall notify Consultant in writing of such default. Consultant shall have ten (10) days, or such longer period as City may designate, to cure the default by rendering satisfactory performance. In the event Consultant fails to cure its default within such period of time, City shall have the right, notwithstanding any other provision of this Agreement, to terminate this Agreement without further notice and without prejudice of any remedy to which City may be entitled at law, in equity, or under this Agreement. Consultant shall be liable for any and all reasonable costs incurred by City as a result of such default. Compliance with the provisions of this section shall not constitute a waiver of any City right to take legal action in the event that the dispute is not cured, provided that nothing herein shall limit City's right to terminate this Agreement without cause pursuant to Section 3.5.

C. If termination is due to the failure of the Consultant to fulfill its obligations under this Agreement, City may, after compliance with the provisions of Section 8.4 B, take over the Scope of Services and prosecute the same to completion by contract or otherwise, and the Consultant shall be liable to the extent that the total cost for completion of the Scope of

Services required hereunder exceeds the Maximum Contract Amount (provided that the City shall use reasonable efforts to mitigate such damages), and City may withhold any payments to the Consultant for the purpose of set-off or partial payment of the amounts owed the City as previously stated. The withholding or failure to withhold payments to Consultant shall not limit Consultant's liability for completion of the Services as provided herein.

**8.5 Waiver.** No waiver of any provision of this Agreement shall be effective unless in writing and signed by a duly authorized representative of the Party against whom enforcement of a waiver is sought. Any waiver by the Parties of any default or breach of any covenant, condition, or term contained in this Agreement, shall not be construed to be a waiver of any subsequent or other default or breach, nor shall failure by the Parties to require exact, full, and complete compliance with any of the covenants, conditions, or terms contained in this Agreement be construed as changing the terms of this Agreement in any manner or preventing the Parties from enforcing the full provisions hereof.

**8.6 Rights and Remedies Cumulative.** Except with respect to rights and remedies expressly declared to be exclusive in this Agreement, the rights and remedies of the Parties are cumulative and the exercise by either Party of one or more of such rights or remedies shall not preclude the exercise by it, at the same or different times, of any other rights or remedies for the same default or any other default by the other Party.

**8.7 Legal Action.** In addition to any other rights or remedies, either Party may take legal action, in law or in equity, to cure, correct or remedy any default, to recover damages for any default, to compel specific performance of this Agreement, to obtain declaratory or injunctive relief, or to obtain any other remedy consistent with the purposes of this Agreement.

**8.8 Attorney Fees.** In the event any dispute between the Parties with respect to this Agreement results in litigation or any non-judicial proceeding, the prevailing Party shall be entitled, in addition to such other relief as may be granted, to recover from the non-prevailing Party all reasonable costs and expenses, including but not limited to reasonable attorney fees, expert consultant fees, court costs and all fees, costs, and expenses incurred in any appeal or in collection of any judgment entered in such proceeding. To the extent authorized by law, in the event of a dismissal by the plaintiff or petitioner of the litigation or non-judicial proceeding within thirty (30) days of the date set for trial or hearing, the other Party shall be deemed to be the prevailing Party in such litigation or proceeding.

## **9. CITY OFFICERS AND EMPLOYEES: NON-DISCRIMINATION**

**9.1 Non-liability of City Officers and Employees.** No officer or employee of the City shall be personally liable to the Consultant, or any successor-in-interest, in the event of any default or breach by the City or for any amount which may become due to the Consultant or to its successor, or for breach of any obligation of the terms of this Agreement.

**9.2 Conflict of Interest.** No officer or employee of the City shall have any financial interest, direct or indirect, in this Agreement nor shall any such officer or employee participate in any decision relating to the Agreement which effects his financial interest or the financial interest of any corporation, partnership, or association in which he/she is, directly or indirectly, interested in violation of any state statute or regulation. Consultant warrants that it has not



paid or given and will not pay or give any third party any money or other consideration in exchange for obtaining this Agreement.

**9.3 Covenant Against Discrimination.** In connection with its performance under this Agreement, Consultant shall not discriminate against any employee or applicant for employment because of race, religion, color, sex, age, marital status, ancestry, or national origin. Consultant shall ensure that applicants are employed, and that employees are treated during their employment, without regard to their race, religion, color, sex, age, marital status, ancestry, or national origin. Such actions shall include, but not be limited to, the following: employment, upgrading, demotion or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship.

## **10. MISCELLANEOUS PROVISIONS**

### **10.1 Patent and Copyright Infringement.**

A. To the fullest extent permissible under law, and in lieu of any other warranty by City or Consultant against patent or copyright infringement, statutory or otherwise, it is agreed that Consultant shall defend at its expense any claim or suit against City on account of any allegation that any item furnished under this Agreement, or the normal use or sale thereof arising out of the performance of this Agreement, infringes upon any presently existing U.S. letters patent or copyright and Consultant shall pay all costs and damages finally awarded in any such suit or claim, provided that Consultant is promptly notified in writing of the suit or claim and given authority, information and assistance at Consultant's expense for the defense of same, and provided such suit or claim arises out of, pertains to, or is related to the negligence, recklessness or willful misconduct of Consultant. However, Consultant will not indemnify City if the suit or claim results from: (1) City's alteration of a deliverable, such that City's alteration of such deliverable created the infringement upon any presently existing U.S. letters patent or copyright; or (2) the use of a deliverable in combination with other material not provided by Consultant when it is such use in combination which infringes upon an existing U.S. letters patent or copyright.

B. Consultant shall have sole control of the defense of any such claim or suit and all negotiations for settlement thereof, Consultant shall not be obligated to indemnify City under any settlement made without Consultant's consent or in the event City fails to cooperate in the defense of any suit or claim, provided, however, that such defense shall be at Consultant's expense. If the use or sale of such item is enjoined as a result of the suit or claim, Consultant, at no expense to City, shall obtain for City the right to use and sell the item, or shall substitute an equivalent item acceptable to City and extend this patent and copyright indemnity thereto.

**10.2 Notices.** All notices or other communications required or permitted hereunder shall be in writing, and shall be personally delivered, sent by pre-paid First Class U.S. Mail, registered or certified mail, postage prepaid, return receipt requested, or delivered or sent by facsimile with attached evidence of completed transmission, and shall be deemed received upon the earlier of (i) the date of delivery to the address of the person to receive such notice if delivered personally or by messenger or overnight courier; (ii) five (5) business days after the

date of posting by the United States Post Office if by mail; or (iii) when sent if given by facsimile. Any notice, request, demand, direction, or other communication sent by facsimile must be confirmed within forty-eight (48) hours by letter mailed or delivered. Other forms of electronic transmission such as e-mails, text messages, instant messages are not acceptable manners of notice required hereunder. Notices or other communications shall be addressed as follows:

To City: City of Rialto  
Attention: City Administrator  
150 S. Palm Ave.  
Rialto, California 92376  
Telephone: (909) 820-2689  
Facsimile: (909) 820-2527

To Consultant: Lockwood Engineering Company  
Attention: Carleton Lockwood, Jr.  
380 W. Foothill Blvd., Suite F  
Rialto, California 92376  
Telephone: (909) 875-5015  
Facsimile: (909) 875-4627

**10.3 Entire Agreement.** This Agreement constitutes the entire agreement between the Parties and supersedes all prior negotiations, arrangements, agreements, representations, and understandings, if any, made by or among the Parties with respect to the subject matter hereof. No amendments or other modifications of this Agreement shall be binding unless executed in writing by both Parties hereto, or their respective successors, assigns, or grantees.

**10.4 Severability.** Whenever possible, each provision of this Agreement shall be interpreted in such a manner as to be effective and valid under applicable law, but if any provision of this Agreement shall be determined to be invalid by a final judgment or decree of a court of competent jurisdiction, such provision shall be ineffective only to the extent of such prohibition or invalidity, without invalidating the remainder of that provision, or the remaining provisions of this Agreement unless the invalid provision is so material that its invalidity deprives either Party of the basic benefit of their bargain or renders this Agreement meaningless.

**10.5 Successors in Interest.** This Agreement shall be binding upon and inure to the benefit of the Parties' successors and assignees.

**10.6 Third Party Beneficiary.** Except as may be expressly provided for herein, nothing contained in this Agreement is intended to confer, nor shall this Agreement be construed as conferring, any rights, including, without limitation, any rights as a third-party beneficiary or otherwise, upon any entity or person not a party hereto.

**10.7 Recitals.** The above-referenced Recitals are hereby incorporated into the Agreement as though fully set forth herein and each Party acknowledges and agrees that such Party is bound, for purposes of this Agreement, by the same.

**10.8. Corporate Authority.** Each of the undersigned represents and warrants that (i) the Party for which he or she is executing this Agreement is duly authorized and existing, (ii) he or she is duly authorized to execute and deliver this Agreement on behalf of the Party for which he or she is signing, (iii) by so executing this Agreement, the Party for which he or she is signing is formally bound to the provisions of this Agreement, and (iv) the entering into this Agreement does not violate any provision of any other Agreement to which the Party for which he or she is signing is bound.

(SIGNATURES ON FOLLOWING PAGE)

IN WITNESS WHEREOF, the City and the Consultant have caused this Agreement to be executed the day and year first above written.

**CITY OF RIALTO, CALIFORNIA**

**APPROVED BY THE CITY COUNCIL:**

By   
Deborah Robertson  
Mayor

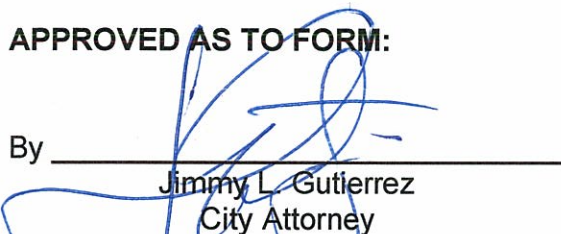
Date 5/22/13

Agreement No. \_\_\_\_\_

**ATTEST:**

By   
Barbara McGee  
City Clerk

**APPROVED AS TO FORM:**

By   
Jimmy L. Gutierrez  
City Attorney

**RECOMMENDED:**

By   
Marcus L. Fuller  
Public Works Director/City Engineer

**CONSULTANT**

By: Lockwood Engineering Company

Firm/Company Name

By: [Signature]  
Signature (notarized)

By: \_\_\_\_\_  
Signature (notarized)

Name: Carlton W. Lockwood Jr

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

Title: PRINCIPAL

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

(This Agreement must be signed in the above space by one of the following: Chairman of the Board, President or any Vice President)

This Agreement must be signed in the above space by one of the following: Secretary, Chief Financial Officer or any Assistant Treasurer)

State of California  
County of San Bernardino ss

State of \_\_\_\_\_  
County of \_\_\_\_\_ ss

On MAY 15, 2013

On \_\_\_\_\_

before me, Danny H. Cabrera, A Notary Public

before me, \_\_\_\_\_

personally appeared Carlton Lockwood Jr.

personally appeared \_\_\_\_\_

who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is are subscribed to the within instrument and acknowledged to me that he she/they executed the same in his her/their authorized capacity(ies), and that by his her/their signatures(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) \_\_\_\_\_ is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signatures(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

WITNESS my hand and official seal.

Notary Signature: [Signature]

Notary Signature: \_\_\_\_\_

Notary Seal:

Notary Seal:

