

**MORONGO VALLEY COMMUNITY SERVICES DISTRICT  
PROFESSIONAL SERVICES AGREEMENT #--\_\_\_\_\_  
ON-CALL TREE MAINTENANCE SERVICES  
(SAMPLE AGREEMENT – INTENTIONALLY INCOMPLETE)**

THIS PROFESSIONAL SERVICES AGREEMENT (hereinafter “Agreement”) is made and entered into, to be effective this \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, by and between the MORONGO VALLEY COMMUNITY SERVICES DISTRICT, a California Special District, (hereinafter referred to as “District”) and WEST COAST ARBORISTS, INC. (WCA), (hereinafter referred to as “Consultant”). District and Consultant are sometimes hereinafter individually referred to as “Party” and are hereinafter collectively referred to as the “Parties.”

**RECITALS**

A. District has determined that there is a need for As-Needed, “On-Call” TREE MAINTENANCE Services for a variety of future xxxxxxxxxxxx projects, (hereinafter the “Project”).

B. Consultant has submitted to District a proposal to provide As-Needed, “On-Call” TREE MAINTENANCE Services for a variety of future xxxxxxxxxxxx projects to District 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. District 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 CONSULTANT**

**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 “Services” or “Work”). The Services shall be more particularly described in the individual Task Order issued by the District. As a material inducement to the District entering into this Agreement, Consultant represents and warrants that this Agreement requires specialized skills and abilities and is consistent with this understanding, Consultant is a provider of first class work and professional services and that Consultant is experienced in performing the Work contemplated herein and, in light of such status and experience, Consultant covenants that it shall perform the Work in a competent, professional, and satisfactory manner consistent with the level of care and skill ordinarily exercised by high quality, experienced, and well qualified members of the profession currently practicing under similar conditions.

**1.2 Contract Documents.** The Agreement between the Parties shall consist of the following: (1) this Agreement; (2) the Scope of Services; (3) the District’s Request for Proposals; (4) the Consultant’s signed, original proposal submitted to the District (“Consultant’s Proposal”); and (5) the

Task Order (as defined herein) (collectively referred to as the "Contract Documents"). The District's Request for Proposals and the Consultant's Proposal, which is attached as Exhibits "B", is 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, Task Order, the District'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: (1<sup>st</sup>) the terms of this Agreement; (2<sup>nd</sup>) the provisions of the Task Order; (3<sup>rd</sup>) Scope of Services (Exhibit "A"), as may be amended from time to time; (4<sup>th</sup>) the provisions of the District's Request for Proposal (Exhibit "B"); and (5<sup>th</sup>) the provisions of the Consultant's Proposal.

**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, including without limitation all applicable Cal/OSHA requirements. Consultant shall be liable for all violations of such laws and regulations in connection with the Services and this Agreement.

**1.4 Licenses, Permits, Fees and Assessments.** Consultant represents and warrants to District that it has obtained all licenses, permits, qualifications, and approvals of whatever nature that are legally required to practice its profession and perform the Work required by this Agreement. Consultant represents and warrants to District 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 Work 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 Work required by this Agreement, and shall indemnify, defend, and hold harmless District against any such fees, assessments, taxes penalties, or interest levied, assessed, or imposed against District 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 District of such fact and shall not proceed except at Consultant's risk until written instructions are received from the District.

**1.6 Care of Work.** Consultant shall adopt reasonable methods during the term of the Agreement to furnish continuous protection to the Work 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 Work by the District, except such losses or damages as may be caused by District'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.

**1.8 Performance of Services.** District's General Manager ("General Manager")~~or Director of xxxxxxxx~~, as provided in Section 2.1 of this Agreement, shall have the right at any time during the term of this Agreement to order the performance of services as generally described in the Scope of Services to perform extra or additional work beyond that specified in the Scope of Services or make changes by altering, adding to, or deducting from such Work. No Work may be undertaken unless a written order is first given by the General Manager ~~or the Director of xxxxxxxx~~ to the Consultant, incorporating therein the identification and description of the Work to be performed, a maximum or not to exceed amount for such Work, and the time to perform the Work.

**1.9 Unauthorized Aliens.** Consultant hereby represents and warrants that it will comply with all of the provisions of the Federal Immigration and Nationality Act, 8 U.S.C.A. §§1101, et seq., as amended, and in connection therewith, shall not employ unauthorized aliens as defined therein. Should Consultant so employ such unauthorized aliens for the performance of any Work under this Agreement, and should any liability or sanctions be imposed against District -for such use of unauthorized aliens, Consultant hereby agrees to reimburse District -for any and all liabilities, actions, suits, claims, demands, losses, costs, judgments, arbitration awards, settlements, damages, demands, orders, or penalties which arise out of or are related to such employment, together with any and all costs, including attorneys' fees, incurred by District-.

## 2.0 COMPENSATION

**2.1 Maximum Contract Amount.** District and Consultant hereby acknowledge and agree that the Services required by this Agreement will vary dependent upon the number, type, and extent of the Services the Consultant shall provide; and no guarantee of the extent or the type of Services required of Consultant under the terms of this Agreement is made by the District. The annual level of services required by this Agreement is unknown and may significantly increase or decrease from year to year. In acknowledgement of the fact that the number and type of projects requiring the Consultant's Services has not been identified for this Agreement, District and Consultant hereby acknowledge and agree that a specific "Maximum Contract Amount" shall be imposed on each separate project that the District may assign Consultant as provided in Section 1.8 and in this Section 2.1. Each such separate project shall be identified as a Task Order authorized by the ~~Director of xxxxxxxx or the~~ General Manager as provided in this Section 2.1.

The method of compensation for each separate District authorized Task Order 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 "B", 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 District ; Consultant shall not be entitled to any additional compensation for attending said meetings. 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 and is subject to the number and type of projects requiring the Consultant's Services throughout the duration of the term of this Agreement, if any. Consultant's compensation shall be limited to the Maximum Contract Amount identified on each separate, individually authorized Task Order corresponding to a project requiring the services of the Consultant.

By approval of this Agreement, the ~~ES~~District's Board of Directors hereby authorizes the subsequent approval of individual Task Orders (Purchase Orders) in those amounts sufficient to cover the cost of required Services necessary for the projects.

**2.2 Method of Payment.** Unless some other method of payment is specified in the Schedule of Compensation (Exhibit "B"), 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 District, in a form approved by the District's Finance Director, 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 District. District shall use reasonable efforts to make payments to Consultant within forty-five (45) 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 District, 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 may 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 ~~Morongo Valley Community Services~~District's Board of Directors for each fiscal year covered by the Agreement. If such appropriations are not made, the General Manager may terminate this Agreement as provided in Section 8.3 of this Agreement; otherwise, there shall be no funding for any Services and Consultant shall not be entitled to payment for any Services that Consultant may provide.

### **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 Work of this Agreement according to the agreed upon Schedule of Performance for each Task Order. Neither Party shall be accountable for delays in performance caused by any condition beyond the reasonable control and without the fault or negligence of the non-performing Party. Delays shall not entitle Consultant to any additional compensation regardless of the Party responsible for the delay.

**3.2 Schedule of Performance.** Consultant shall commence the Services pursuant to this Agreement upon receipt of a written Task Order and shall perform all Services within the time period(s) established in the Schedule of Performance. When requested by Consultant, extensions to the time period(s) specified in the Schedule of Performance may be approved in writing by the Contract Officer, but such extensions shall not exceed one hundred eighty (180) days cumulatively; however, the District shall not be obligated to grant such an extension.

**3.3 Force Majeure.** The time for performance of Services to be rendered under each Task Order may be extended because of any delays due to a Force Majeure Event, if Consultant notifies the Contract Officer within ten (10) days of the commencement of the Force Majeure Event. A Force Majeure Event shall mean an event that materially affects the Consultant's performance and is one or more of the following: (1) Acts of God or other natural disasters occurring at the project site; (2) terrorism or other acts of a public enemy; (3) orders of governmental authorities (including, without limitation, unreasonable and unforeseeable delay in the issuance of permits or approvals by governmental authorities that are required for the Work); and (4) pandemics, epidemics or quarantine restrictions. For purposes of this section, "orders of governmental authorities," includes ordinances, emergency proclamations and orders, rules to protect the public health, welfare and safety, and other actions of the District in its capacity as a municipal authority. After Consultant notification, the Contract Officer shall investigate the facts and the extent of any necessary delay and extend the time for performing the Services for the period of the enforced delay when and if, in the Contract Officer's judgment, such delay is justified. The Contract Officer's determination shall be final and conclusive upon the Parties to this Agreement. The Consultant will not receive an adjustment to the contract price or any other compensation. Notwithstanding the foregoing, the District may still terminate this Agreement in accordance with the termination provisions of this Agreement.

**3.4 Term.** Unless earlier terminated under the terms of this Agreement, this Agreement shall continue in full force and effect for three (3) years from the effective date of this Agreement. At the sole discretion of the General Manager, upon written notice to Consultant and mutual agreement, the term of this Agreement may be extended for two (2) additional one (1) year terms.

#### 4. COORDINATION OF WORK

**4.1 Representative of Consultant.** The following principal of Consultant is hereby designated as being the principal and representative 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: xxxxxxxxxxxxx. It is expressly understood that the experience, knowledge, education, capability, expertise, and reputation of the foregoing principal is a substantial inducement for District to enter into this Agreement. Therefore, the foregoing principal 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 principal 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 General Manager ~~of the CSD~~ and is subject to change by the General Manager. 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 District to the Contract Officer. Unless otherwise specified herein, any approval of ~~City/District~~ required hereunder shall mean

the approval of the Contract Officer. The Contract Officer shall have authority to sign all documents on behalf of the District required hereunder to carry out the terms of this Agreement.

**4.3 Prohibition Against Subcontracting or Assignments.** The experience, knowledge, education, capability, and reputation of Consultant, its principals and employees, were a substantial inducement for District to enter into this Agreement. Consultant shall not contract with any other individual or entity to perform any Services required under this Agreement without the District's express written approval. In addition, neither this Agreement nor any interest may be assigned or transferred, voluntarily or by operation of law, without the prior written approval of District. Subcontracts, if any, shall contain a provision making them subject to all provisions stipulated in this Agreement including without limitation the insurance and indemnification requirements. If Consultant is permitted to subcontract any part of this Agreement by District, Consultant shall be responsible to District for the acts and omissions of its subconsultant(s) in the same manner as it is for persons directly employed. Nothing contained in this Agreement shall create any contractual relationships between any subconsultant and District. All persons engaged in the Work will be considered employees of Consultant. District 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 District. 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 District.

**4.4 Independent Consultant.**

A. The legal relationship between the Parties is that of an independent Consultant, and nothing herein shall be deemed to make Consultant a District 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 District 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 District 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 District's offices. District 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. District shall not in any way or for any purpose be deemed to be a partner of Consultant in its business or otherwise a joint ventures 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 District, or bind District in any manner.

**Commented [SK1]:** See the comments in my cover e-mail regarding satisfaction of the ABC Test.

C. No District 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, District shall not pay salaries, wages, or other compensation to Consultant for the performance of Services under this Agreement. District shall not be liable for compensation or indemnification to Consultant, its officers, employees, or agents, for injury or sickness arising out of performing Services hereunder. If for any reason any court or governmental agency determines that the District has financial obligations, other than pursuant to Section 2 and Subsection 1.8 herein, of any nature relating to salary, taxes, or benefits of Consultant's officers, employees, servants, representatives, subconsultants, or agents, Consultant shall indemnify District for all such financial obligations.

#### **4.5 California Labor Code Requirements.**

A. Consultant is aware of the requirements of California Labor Code Sections 1720 et seq. and 1770 et seq., which require the payment of prevailing wage rates and the performance of other requirements on certain "public works" and "maintenance" projects ("Prevailing Wage Laws"). If the Services are being performed as part of an applicable "public works" or "maintenance" project, as defined by the Prevailing Wage Laws, and if the total compensation is \$15,000 or more for maintenance or \$25,000 or more for construction, alteration, demolition, installation, or repair, Consultant agrees to fully comply with such Prevailing Wage Laws. Consultant shall defend, indemnify and hold the District, its officials, officers, employees and agents free and harmless from any claims, liabilities, costs, penalties or interest arising out of any failure or alleged failure to comply with the Prevailing Wage Laws. It shall be mandatory upon the Consultant and all subcontractors to comply with all California Labor Code provisions, which include but are not limited to prevailing wages (Labor Code Sections 1771, 1774 and 1775), employment of apprentices (Labor Code Section 1777.5), certified payroll records (Labor Code Sections 1771.4 and 1776), hours of labor (Labor Code Sections 1813 and 1815) and debarment of contractors and subcontractors (Labor Code Section 1777.1).

B. If the Services are being performed as part of an applicable "public works" or "maintenance" project and if the total compensation is \$15,000 or more for maintenance or \$25,000 or more for construction, alteration, demolition, installation, or repair, then pursuant to Labor Code Sections 1725.5 and 1771.1, the Consultant and all subcontractors performing such Services must be registered with the Department of Industrial Relations. Consultant shall maintain registration for the duration of the Project and require the same of any subcontractors, as applicable. This Agreement may also be subject to compliance monitoring and enforcement by the Department of Industrial Relations. It shall be Consultant's sole responsibility to comply with all applicable registration and labor compliance requirements.

### **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 District, 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 Work hereunder by Consultant, its agents, representatives, or employees. In the event the ~~District~~General Manager determines that the Work or Services to be performed under this Agreement creates an increased or decreased risk of loss to the District, the Consultant agrees that the minimum limits of the insurance policies may be changed accordingly upon receipt of written notice from the General Manager 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 and two-million dollars (\$2,000,000.00) annual aggregate, in accordance with the provisions of this section.

(1) Consultant shall either: (a) certify in writing to the District -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~~General Manager.

(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 District and to require each of its subconsultants, if any, to do likewise under their workers’ compensation insurance policies. If Consultant has no employees, Consultant shall complete the District’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 Consultants, 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 General Manager prior to commencing any work or services under this Agreement. Consultant guarantees payment of all deductibles and self-insured retentions. District reserves the right to reject deductibles or self-insured retentions in excess of \$10,000, and the General Manager 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:

A. For any claims related to this Agreement, Consultant's coverage shall be primary insurance as respects District and its officers, council members, officials, employees, agents, and volunteers. Any insurance or self-insurance maintained by the District and its officers, council members, officials, employees, agents, and volunteers shall be in excess of Consultant's insurance and shall not contribute with it.

B. Any failure to comply with reporting or other provisions of the policies, including breaches of warranties, shall not affect coverage provided to District and its officers, council members, officials, employees, agents, and volunteers.

C. All 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 District or its operations shall limit the application of such insurance coverage.

D. 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 General Manager and approved in writing.

E. 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.

F. Consultant agrees to ensure that subconsultants, 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 subconsultants and others engaged in the Project will be submitted to the District for review.

G. Consultant acknowledges and agrees that any actual or alleged failure on the part of the District to inform Consultant of non-compliance with any insurance requirement in no way imposes any additional obligations on the District nor does it waive any rights hereunder in this or any other regard.

H. 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 District no later than ten (10) days prior to expiration of the lapsing coverage.

I. 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.

J. 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.

K. Consultant agrees to provide immediate notice to District of any claim or loss against Consultant arising out of the Work 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. District 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 District, or to reduce or dilute insurance available for payment of potential claims.

L. 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 General Manager or his designee due to unique circumstances.

**5.5 Verification of Coverage.** Consultant shall furnish District 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 District before work commences. District 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 Morongo Valley Community Services District or (2) an acceptable Certificate of Liability Insurance Coverage with an approved Additional Insured Endorsement with the following endorsements stated on the certificate:

A. *"The Morongo Valley Community Services District, its officials, employees, and agents are named as an additional insured..." ("as respects Morongo Valley Community Services District Contract No. \_\_\_" or "for any and all work performed with the District" may be included in this statement).*

B. *"This insurance is primary and non-contributory over any insurance or self-insurance the District may have..." ("as respects Morongo Valley Community Services District Contract No. \_\_\_" or "for any and all work performed with the District" may be included in this statement).*

C. *"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.*

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

In addition to the endorsements listed above, the ~~Morongo Valley Community Services~~District shall be named the certificate holder on the policies. All certificates of insurance and endorsements are to be received and approved by the District 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

**6.1** To the fullest extent permitted by law, Consultant shall defend (at Consultant's sole cost and expense), indemnify, protect, and hold harmless District, its elected officials, officers, employees, agents, and volunteers (collectively the "Indemnified Parties"), from and against any and all liabilities, actions, suits, claims, demands, losses, costs, judgments, arbitration awards, settlements, damages,

demands, orders, penalties, and expenses including legal costs and attorney fees (collectively "Claims"), including but not limited to Claims arising from injuries to or death of persons (Consultant's employees included), for damage to property, including property owned by ~~City~~District, for any violation of any federal, state, or local law or ordinance or in any manner arising out of, pertaining to, or incident to any acts, errors or omissions, or willful misconduct committed by Consultant, its officers, employees, representatives, and agents, that arise out of or relate to Consultant's performance of Services or this Agreement. This indemnification clause excludes Claims arising from the sole negligence or willful misconduct of the Indemnified Parties. Under no circumstances shall the insurance requirements and limits set forth in this Agreement be construed to limit Consultant's indemnification obligation or other liability under this Agreement. Consultant's indemnification obligation shall survive the expiration or earlier termination of this Agreement until all actions against the Indemnified Parties for such matters indemnified are fully and finally barred by the applicable statute of limitations or, if an action is timely filed, until such action is final.

**6.2** If Consultant's obligation to defend, indemnify, and/or hold harmless arises out of Consultant's performance as a "design professional" (as that term is defined under Civil Code section 2782.8), then, and only to the extent required by Civil Code section 2782.8, which is fully incorporated herein, Consultant's indemnification obligation shall be limited to the extent which the Claims arise out of, pertain to, or relate to the negligence, recklessness, or willful misconduct of the Consultant in the performance of the Services or this Agreement, and, upon Consultant obtaining a final adjudication by a court of competent jurisdiction, Consultant's liability for such claim, including the cost to defend, shall not exceed the Consultant's proportionate percentage of fault.

## **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 District is greatly concerned about the cost of the Work 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 Work 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, subconsultants, and agents in the performance of this Agreement shall be the property of District and shall be promptly delivered to District 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 District 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 District's sole risk and without liability to Consultant, and the District 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 subconsultants shall provide for assignment to District of any documents or materials prepared by them, and in the event, Consultant fails to secure such assignment, Consultant shall indemnify District 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 District's prior written authorization.

**7.5 Audit and Inspection of Records.** After receipt of reasonable notice and during the regular business hours of District, Consultant shall provide District, or other agents of District, such access to Consultant's books, records, payroll documents, and facilities as District 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 District 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. Legal actions concerning any dispute, claim, or matter arising out of or in relation to this Agreement shall be instituted in the Superior Court of the County of ~~Riverside~~San Bernardino, State of California, or any other appropriate court in such County, and Consultant covenants and agrees to submit to the personal jurisdiction of such court in the event of such action.

**8.2 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.

**8.3 Termination.** District may terminate this Agreement at any time, with or without cause, upon thirty (30) days written notice to Consultant. 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 District. Upon receipt of the notice of termination,

Consultant shall immediately cease all Services except such as may be specifically approved by the Contract Officer. Consultant shall be entitled to compensation for all Services rendered prior to receipt of the notice of termination and for any Services authorized by the Contract Officer after such notice. District shall not be liable for any costs other than the charges or portions thereof which are specified herein. Consultant shall not be entitled to payment for unperformed Services and shall not be entitled to damages or compensation for termination of Work. Consultant may not terminate this Agreement except for cause, upon thirty (30) days written notice to District,

**8.4 Default of Consultant.**

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

B. If the General Manager, 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 District may designate, to cure the default by rendering satisfactory performance. In the event Consultant fails to cure its default within such period of time, District 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 District may be entitled at law, in equity, or under this Agreement. Consultant shall be liable for any and all reasonable costs incurred by District as a result of such default. Compliance with the provisions of this section shall not constitute a waiver of any District right to take legal action in the event that the dispute is not cured, provided that nothing herein shall limit District's right to terminate this Agreement without cause pursuant to Section 8.3.

C. If termination is due to the failure of the Consultant to fulfill its obligations under this Agreement, District may, after compliance with the provisions of Section 8.4.B, take over the work 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 Services required hereunder exceeds the Maximum Contract Amount (provided that the District shall use reasonable efforts to mitigate such damages), and District may withhold any payments to the Consultant for the purpose of set-off or partial payment of the amounts owed the District 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.

## 9. DISTRICT OFFICERS AND EMPLOYEES: NON-DISCRIMINATION

**9.1 Non-liability of District Officers and Employees.** No officer or employee of the District shall be personally liable to the Consultant, or any successor-in-interest, in the event of any default or breach by the District 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.** Consultant acknowledges that no officer or employee of the District has or shall have any direct or indirect financial interest in this Agreement, nor shall Consultant enter into any agreement of any kind with any such officer or employee during the term of this Agreement and for one year thereafter. Consultant warrants that Consultant 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 actual or perceived race, religion, color, sex, age, marital status, ancestry, national origin (*i.e.*, place of origin, immigration status, cultural or linguistic characteristics, or ethnicity), sexual orientation, gender identity, gender expression, physical or mental disability, or medical condition (each a “prohibited basis”). Consultant shall ensure that applicants are employed, and that employees are treated during their employment, without regard to any prohibited basis. As a condition precedent to District’s lawful capacity to enter this Agreement, and in executing this Agreement, Consultant certifies that its actions and omissions hereunder shall not incorporate any discrimination arising from or related to any prohibited basis in any Consultant activity, including but not 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; and further, that Consultant is in full compliance with the provisions of Palm Springs Municipal Code Section 7.09.040, including without limitation the provision of benefits, relating to non-discrimination in District contracting.

Commented [SK2]: Why should these provisions apply?

## 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 District 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 District 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 CityDistrict if the suit or claim results from: (1) CityDistrict's alteration of a deliverable, such that CityDistrict'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 CityDistrict under any settlement made without Consultant's consent or in the event CityDistrict 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 CityDistrict, shall obtain for CityDistrict the right to use and sell the item, or shall substitute an equivalent item acceptable to CityDistrict 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 CityDistrict: Morongo Valley Community Services District  
Attention: General Manager  
P.O. BOX 46  
Morongo Valley, California 92256  
Telephone: (760)  
Facsimile: (760)

To Consultant: XXXXXXXXXXXXXXXXXXXXXXXXXXXX

**10.3 Entire Agreement.** This Agreement constitutes the entire understanding between the Parties and supersedes and cancels 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.

**10.9 Counterparts.** This Agreement may be signed in counterparts, each of which shall constitute an original.

[SIGNATURES ON FOLLOWING PAGE]

**SIGNATURE PAGE TO AGREEMENT BY AND BETWEEN THE MORONGO VALLEY COMMUNITY SERVICES DISTRICT AND **\*\*\*INSERT NAME\*\*\*****

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the dates stated below.

**CONTRACTOR:**

By: \_\_\_\_\_ Signature  
By: \_\_\_\_\_ Signature  
(2nd signature required for Corporations)

Date: \_\_\_\_\_ Date: \_\_\_\_\_

**MORONGO VALLEY COMMUNITY SERVICES DISTRICT:**

**APPROVED BY THE BOARD OF DIRECTORS:**

Date: \_\_\_\_\_ Item No. \_\_\_\_\_

**APPROVED AS TO FORM:**

By: \_\_\_\_\_  
Attorney

**ATTEST:**

By: \_\_\_\_\_  
Secretary

**APPROVED:**

By: \_\_\_\_\_  
General Manager

Date: \_\_\_\_\_

**EXHIBIT "A"**  
**SCOPE OF SERVICES**

**EXHIBIT "B"**  
**SCHEDULE OF COMPENSATION**