



CITY COUNCIL AGENDA REPORT

MEETING DATE: JUNE 2, 2009

ITEM NUMBER:

SUBJECT: SOLAR POWER PURCHASE AGREEMENT FOR THE NEIGHBORHOOD COMMUNITY CENTER

DATE: MAY 14, 2009

FROM: DEVELOPMENT SERVICES DEPARTMENT

**PRESENTATION BY: KHANH NGUYEN, ACTING ASST. DEV SVS DIR – BUILDING OFFICIAL
KIMBERLY BRANDT, ACTING DEV. SVS. DIRECTOR**

FOR FURTHER INFORMATION CONTACT: KHANH NGUYEN (714) 754-5277

RECOMMENDATION

Authorize the Mayor and City Clerk to execute agreement with SolarCity Corporation, that provides for SolarCity to install and operate photovoltaic electric generators on the roof of the Neighborhood Community Center (NCC) and the Downtown Recreation Center (DRC); and a power purchase agreement for electrical energy produced by the solar system for a term of fifteen years with an option to renew for additional term of five years.

BACKGROUND

The Solar Power Purchase Agreement (SPPA) meets our goal to enhance our environmental and economical sustainability pursuant to Council Policy 500-14. It also yields cost savings to the City taxpayers through reduced operating costs. There are many benefits to utilizing Photovoltaic and SPPA.

Advantages of Solar Electric systems:

- Clean and abundant energy
- Generate the most power when the demand is high
- No moving parts, low maintenance
- Solar panels extend the life of the roof
- Reduce green house gases and City carbon footprint

Advantages of a SPPA:

- Superior to leasing because City only pays for energy generated by system
- Superior to owning system because City does not have to maintain the system
- Predictable energy cost for the life of the agreement

Recognizing the benefits of a SPPA, staff advertised for bids in March 2009 and received five proposals. An outside panel rated the five proposals based on qualification and experience and two vendors stood out from others, **SolarCity** and

Borrego Solar. The City can shortlist and utilize these two vendors for similar future projects.

City staff opened the pricing package from these two vendors and disqualified one vendor for not meeting the cost neutral requirement for this project. SolarCity met the cost neutral requirement and was selected for the SPPA.

The installation is scheduled to start in September 2009 and completed by October 2009. Staff is not aware of any other Orange County city that has a photovoltaic system on their facilities.

The 106kW AC system is expected to generate 2,790,000 kWhr in 15 years, thereby offsetting 3,000,000 lbs of Carbon Dioxide, 4,000,000 miles driven by the average car, or the equivalent of planting 3,280 mature trees.

FISCAL REVIEW

The contract energy price is \$0.1320/kwh with an annual escalation of 3.9%. The estimated saving is \$3,339 in electricity cost to the NCC after the first year with the cumulative savings of \$154,000 over the 15-year life of the agreement.

SolarCity was able to provide a “cost neutral or better” contract pricing due to their innovative thin film technology solar panels. The timing of this agreement is critical as the State incentive, currently at Tier 5, can drop to a Tier 6 at any time, rendering this project no longer cost neutral.

LEGAL AND RISK MANAGEMENT REVIEW

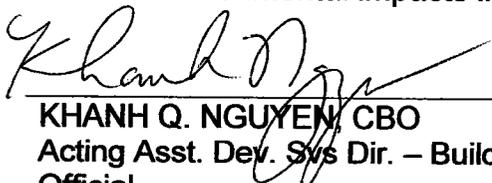
The attached Solar Power Purchase Agreement has been reviewed by the City Attorney and is “approved as to form”. Additionally, Risk Management has approved all insurance provisions for compliance with City requirements.

ALTERNATIVES CONSIDERED

Council may reject the agreement or direct staff to bring back for discussion at a future study session.

CONCLUSION

The Solar Power Purchase Agreement implements Council's long-term commitment to reduce environmental impacts in a cost-effective manner.


KHANH Q. NGUYEN, CBO
Acting Asst. Dev. Svs Dir. – Building
Official


KIMBERLY BRANDT, AICP
Acting Development Svs. Director

- ATTACHMENTS: 1 – SolarCity PPA Summary Proposal for the NCC
2 – Solar Power Purchase Agreement
3 – Limited Warranty Agreement

DISTRIBUTION: City Manager
Assistant City Manager
City Attorney
Public Services Director
Purchasing
City Clerk (2)
Staff (4)
File (2)

060209SolarPowerPA	Date: 052109	Time: 10:00 a.m.
--------------------	--------------	------------------

**PPA Summary Proposal for the
City of Costa Mesa –
Neighborhood Community Center**

SolarCity

SolarCity[®]

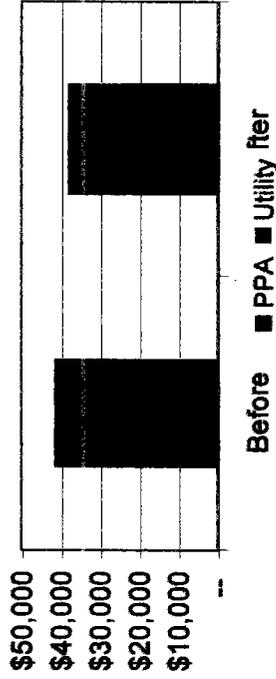
10000 Wilshire Blvd, Suite 1000, Beverly Hills, CA 90210 | 800.451.7000 | www.solarcity.com

NCC – City of Costa Mesa PPA Summary

PPA Summary

\$ per kwh	\$0.132
Annual Escalation Rate	3.9%
Term	15
Optional Buyout	Fair Market Value
Insurance Provided by	Customer
Net Savings in Year 1	\$3,339
Annual Utility Escalation Rate	6.0%

Annual Savings



Design Summary

System Size in kW DC	118.8
Modules	1,584 First Solar 75 watt modules
Mounting Method	Various
System Monitoring	15 years remote
Exclusions	structural upgrade

PPA Financial Metrics

Annual Savings (\$ / % Costs)	\$3,339 / 8%
Savings Over 15 Years without buyout	\$154,121
15 Year NPV at 7% without buyout	\$80,750
Savings Over 30 Years with buyout	\$1,250,270
30 Year NPV at 7% with buyout	\$262,034
Payback Period in Years	Immediate



PPA Cash Flow

Prepared For: NCC- Costa Mesa
 Prepared By: Jeff Palmer
 Date Prepared: 12/10/2008
 Cumulative Savings: \$154,121
 Net Present Value: \$80,750
 Payback: Immediate

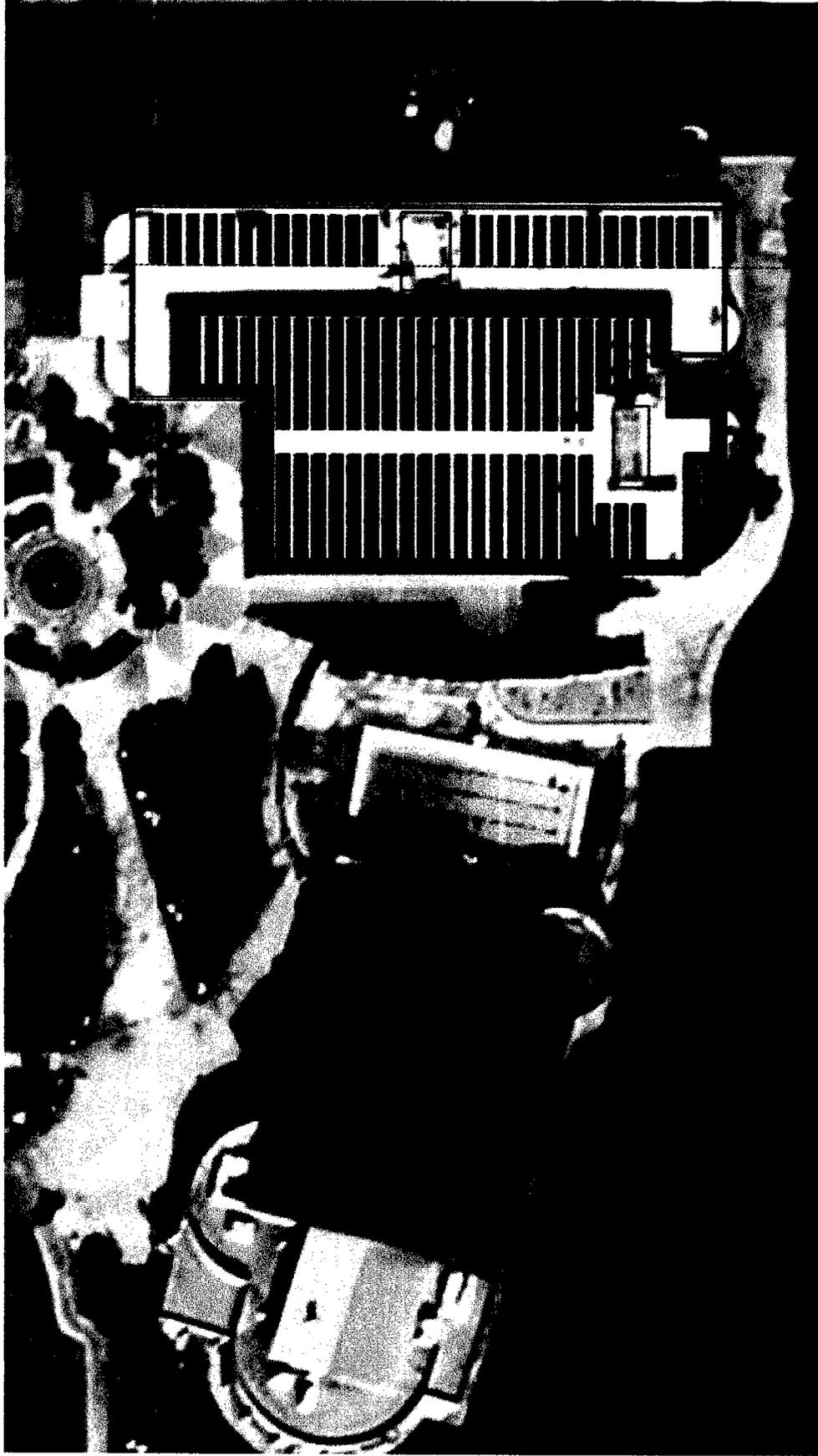
Model Assumptions
 System Size in kW DC 118.8
 Annual Energy Production in kWh 186,510
 Increase in Utility Rates 6.0%
 Degradation in Annual Production 0.5%
 Increase in Annual Savings 5.4%
 Federal Tax Rate 0.0%
 State Tax Rate 0.0%
 Discount Rate 7.0%
 Cost Per kWh \$0.132
 Escalation Rate 3.8%
 Financing Term in Years 15
 End of Term Buyout Percentage 40%
 Optional Buyout (1=Yes, 0=No) -

Analysis of Cash Flows of PV System Financed with Power Purchase Agreement Without Buyout of Existing System

Year	PPA Rate	Energy Produced	Power Purchase Agreement			Utility Savings	Depreciation Savings		Total Cash Flow	Present Value		Cumulative Cash Flow
			PPA Payments	Tax Impact	Optional Buyout		Pre-Tax Savings	Tax Impact		Federal Tax Savings	State Tax Savings	
1	\$0.132	186,510	(\$24,645)	-	-	\$27,984	-	-	\$3,339	0.935	\$3,121	\$3,339
2	\$0.137	185,577	(\$25,478)	-	-	\$29,515	-	-	\$4,037	0.873	\$3,528	\$7,376
3	\$0.143	184,645	(\$26,338)	-	-	\$31,128	-	-	\$4,760	0.816	\$3,910	\$12,187
4	\$0.148	183,712	(\$27,227)	-	-	\$32,829	-	-	\$5,602	0.763	\$4,274	\$17,769
5	\$0.154	182,780	(\$28,148)	-	-	\$34,623	-	-	\$6,477	0.713	\$4,618	\$24,246
6	\$0.160	181,847	(\$29,094)	-	-	\$36,513	-	-	\$7,419	0.668	\$4,943	\$31,864
7	\$0.166	180,915	(\$30,074)	-	-	\$38,505	-	-	\$8,431	0.623	\$5,251	\$40,096
8	\$0.173	179,982	(\$31,085)	-	-	\$40,605	-	-	\$9,519	0.582	\$5,540	\$49,615
9	\$0.178	179,050	(\$32,130)	-	-	\$42,818	-	-	\$10,688	0.544	\$5,813	\$60,303
10	\$0.186	178,117	(\$33,210)	-	-	\$45,151	-	-	\$11,941	0.508	\$6,070	\$72,244
11	\$0.194	177,185	(\$34,324)	-	-	\$47,609	-	-	\$13,285	0.475	\$6,312	\$85,529
12	\$0.201	176,252	(\$35,476)	-	-	\$50,200	-	-	\$14,725	0.444	\$6,538	\$100,254
13	\$0.208	175,319	(\$36,664)	-	-	\$52,931	-	-	\$16,267	0.415	\$6,750	\$116,521
14	\$0.217	174,387	(\$37,891)	-	-	\$55,808	-	-	\$17,917	0.388	\$6,949	\$134,439
15	\$0.226	173,454	(\$39,158)	-	-	\$58,840	-	-	\$19,682	0.362	\$7,134	\$154,121
16										0.339		\$154,121
17										0.317		\$154,121
18										0.298		\$154,121
19										0.277		\$154,121
20										0.258		\$154,121
21										0.242		\$154,121
22										0.228		\$154,121
23										0.211		\$154,121
24										0.197		\$154,121
25										0.184		\$154,121
26										0.172		\$154,121
27										0.161		\$154,121
28										0.150		\$154,121
29										0.141		\$154,121
30										0.131		\$154,121
Total			(\$470,938)	=	=	\$625,059	=	=	\$154,121			\$154,121



Preliminary Design of NCC PV System



First Solar Modules- Thin Film Technology



Made in America
SolarCity
SOLAR ENERGY SOLUTIONS

Web Based Monitoring- Building Usage and PV Production Tracking

Peter Rive
SAN FRANCISCO, CA



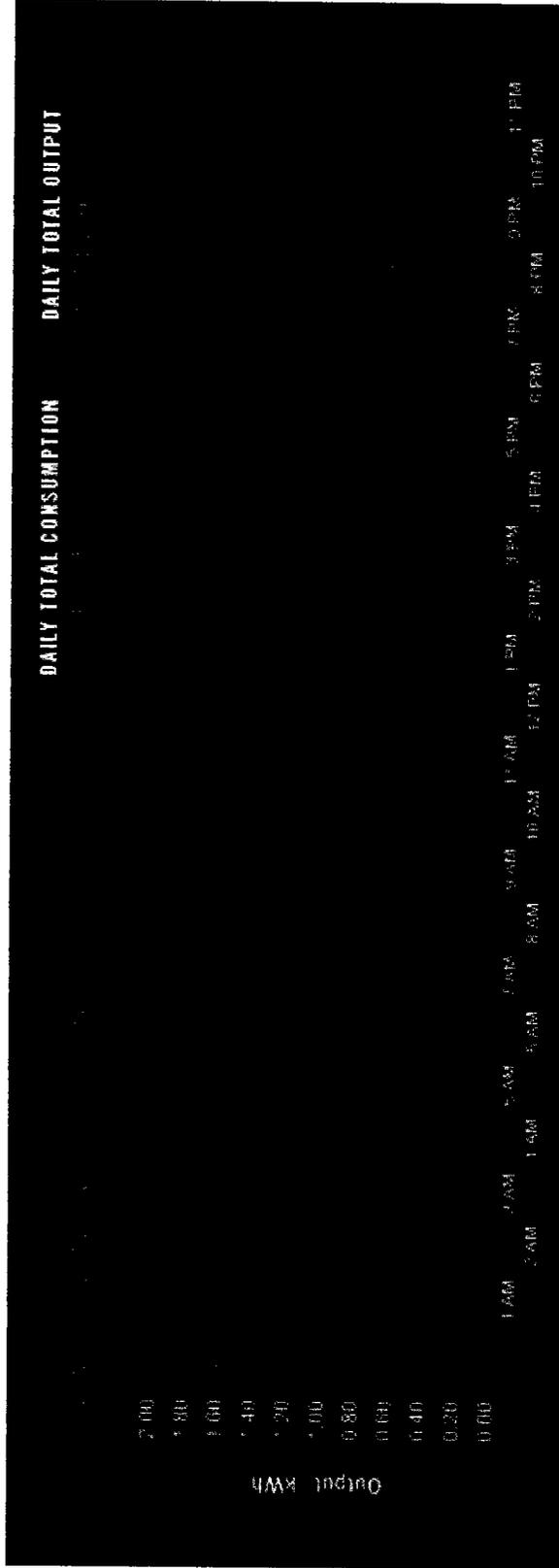
DAY	WEEK	MONTH	YEAR
PREVIOUS	CURRENT		

SHARE THIS PAGE
DOWNLOAD

CURRENT WEATHER

 72.00 S° C / 47° F
 7.00% 0%
 Sun: 05:18 am
 Sunset: 04:52 pm

LIFETIME OUTPUT
5,395.15 kWh



Thank you!

Prepared by Jeff Palmer

310-895-6595

SolarCity

SolarCity®

ATTACHMENT 2



Solar Power Purchase Agreement (Commercial)

This Solar Power Purchase Agreement (this “**Agreement**”) is entered into by the parties listed below (each a “**Party**” and collectively the “**Parties**”) as of the date signed by Seller below (the “**Effective Date**”).

Purchaser:		Seller:	
Name and Address	City of Costa Mesa 77 Fair Drive, 2 nd Floor Costa Mesa, CA 92626	Name and Address	SolarCity Corporation 393 Vintage Park Drive, Suite 140 Foster City, CA 94404 Attention: Lease/License Administrator
Phone	(714)751-5273	Phone	(650) 638-1028
Fax	(714)754-4856	Fax	(650) 638-1029
E-mail	knguyen@ci.costa-mesa.ca.us	E-mail	LeaseAdministrator@solarcity.com
Purchaser (check one)	<input type="checkbox"/> owns the Facility <input type="checkbox"/> leases the Facility		

This Agreement sets forth the terms and conditions of the purchase and sale of solar generated electric energy from the solar panel system described in **Exhibit 2** (the “**System**”) and installed at the Purchaser’s facility described in **Exhibit 3** (the “**Facility**”).

The exhibits listed below are incorporated by reference and made part of this Agreement.

- Exhibit 1 Pricing Attachment
- Exhibit 2 System Description
- Exhibit 3 Purchaser’s Facility
- Exhibit 4 Delivery Point
- Exhibit 5 License Area
- Exhibit 6 Memorandum of License
- Exhibit 7 General Terms and Conditions (*Revised February 16, 2009*)
- Exhibit 8 RFP 1129
- Exhibit 9 Response to RFP 1129
- Exhibit 10 Pricing Detail
- Exhibit 11 CC Policy 100-5
- Exhibit 12 Certificate of Insurance

Purchaser:

CITY OF COSTA MESA,
A municipal corporation

Mayor of the City of Costa Mesa

Date: _____

Seller:

SolarCity Corporation

Signature

Date: _____

Name and Title

Social Security or Taxpayer ID Number

ATTEST:

City Clerk and ex-officio Clerk
of the City of Costa Mesa

APPROVED AS TO FORM:

Fambird Hall Barber

City Attorney

Date: 5/22/09

APPROVED AS TO INSURANCE:

Ylona Yman

Risk Management

Date: 5/22/09

APPROVED AS TO CONTENT:

Project Manager

Date: _____

**Exhibit 1
Pricing Attachment**

1. **Term:** Fifteen (15) years, beginning on the Commercial Operation Date.
2. **Additional Terms:** Up to Three (3) Additional Terms of Five (5) years each.
3. **Environmental Incentives and Environment Attributes Accrue to Seller.**
4. **Contract Price:**

Contract Year	\$/kWh
1	\$0.1320
2	\$0.1371
3	\$0.1425
4	\$0.1481
5	\$0.1538
6	\$0.1598
7	\$0.1661
8	\$0.1725
9	\$0.1793
10	\$0.1863
11	\$0.1935
12	\$0.2011
13	\$0.2089
14	\$0.2171
15	\$0.2255

5. **Condition Satisfaction Date:** October 15, 2009
6. **Anticipated Commercial Operation Date:** November 15, 2009
7. **Outside Commercial Operation Date:** December 31, 2009
8. **Purchase Option Price:**

End of Contract Year	Option Price*:
6	\$468,904.32
10	\$426,528.87
15	Fair Market Value

9. **Termination Value:**

Contract Year	Termination Value
1	\$1,199,769.33
2	\$933,329.13
3	\$788,922.03
4	\$659,469.90
5	\$536,557.74
6	\$406,782.53
7	\$387,775.83
8	\$377,110.23
9	\$364,895.37

10	\$351,019.44
11	\$335,363.86
12	\$317,802.96
13	\$298,203.52
14	\$276,424.38
15	\$252,316.01

10. **Rebate Variance.** All prices in this Agreement are calculated based on a rebate of SCE Tier 5. If the actual rebate is lower than calculated, prices will be adjusted pro-rata to reflect the actual rebate received.

Exhibit 2

System Description

1. **System Location:** Neighborhood Community Center; 1845 Park Avenue, Costa Mesa, CA 92627
District Recreation Center; 1860 Anaheim Avenue, Costa Mesa, CA 92627
2. **System Size (DC kW):** 118kW DC
3. **Expected First Year Energy Production:** 186,510 kWh
4. **Scope:** The 118W DC photovoltaic system will feature two arrays, one on top of the NCC building and the second mounted on the south facing roof of the DRC. The array on the NCC's roof will be non-penetrating system with a panel tilt of 10 degree angle, oriented at due south. The array on the DRC's roof will be a non-penetrating roof clamp to the standing seam roof, at the roof's existing roof pitch of 16 degrees, oriented at 210 degrees Southwest. A trench with electrical wiring will run along side of the sidewalk that connects the two buildings and will tie the two systems together into the NCC's meter.
5. **Expected Module(s):** First Solar Modules
6. **Expected Inverter(s):** SatCon Power Systems Canada Ltd.
7. **Expected Structure:** Neighborhood Community Center - Schletter Non-Penetrating Roof Mount
District Recreation Center – Non Penetrating Roof Clamp
8. **Includes:** Trenching between buildings in included. Also includes roofer coordination of Best Roofing, existing roof contractor, to preserve roofing warranty.

Exhibit 3
Purchaser's Facility

Neighborhood Community Center; 1845 Park Avenue, Costa Mesa, CA 92627

A PARCEL OF LAND LOCATED IN THE STATE OF CALIFORNIA, COUNTY OF ORANGE, WITH A SITUS ADDRESS OF, CA CURRENTLY OWNED BY CITY OF COSTA MESA HAVING A TAX ASSESSOR NUMBER OF 424-221-22 LOT 13 AND LOTS 14-24 INC POR ABAND ST.

District Recreation Center; 1860 Anaheim Avenue, Costa Mesa, CA 92627

A PARCEL OF LAND LOCATED IN THE STATE OF CALIFORNIA, COUNTY OF ORANGE, WITH A SITUS ADDRESS OF 1860 ANAHEIM AVE, COSTA MESA CA 92627-2707 CURRENTLY OWNED BY COSTA MESA PARK/RECREATION DISTRICT HAVING A TAX ASSESSOR NUMBER OF 424-251-01 AND BEING THE SAME PROPERTY MORE FULLY DESCRIBED AS NEWPORT MESA TR LOT 303 AND 304 AND DESCRIBED IN

DOCUMENT	NUMBER	723200668	RECORDED	09/24/1964.
----------	--------	-----------	----------	-------------

Exhibit 4
Delivery Point

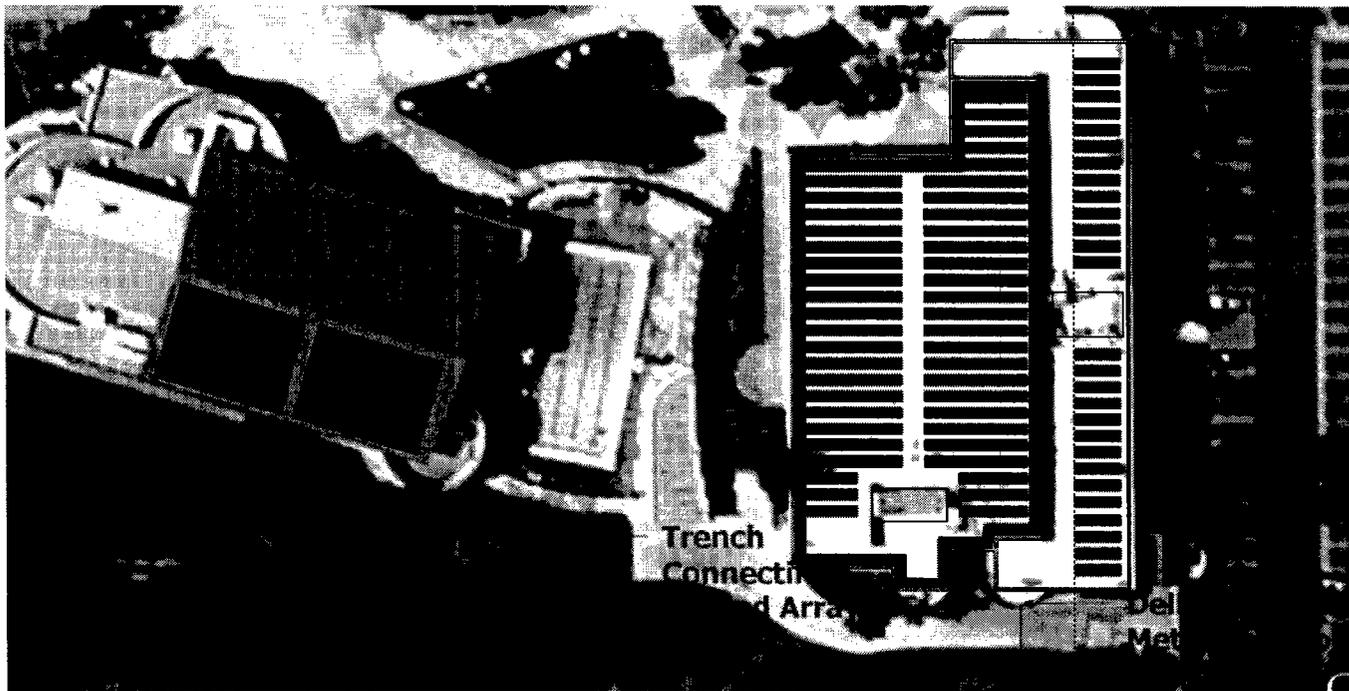


Exhibit 5
License Area

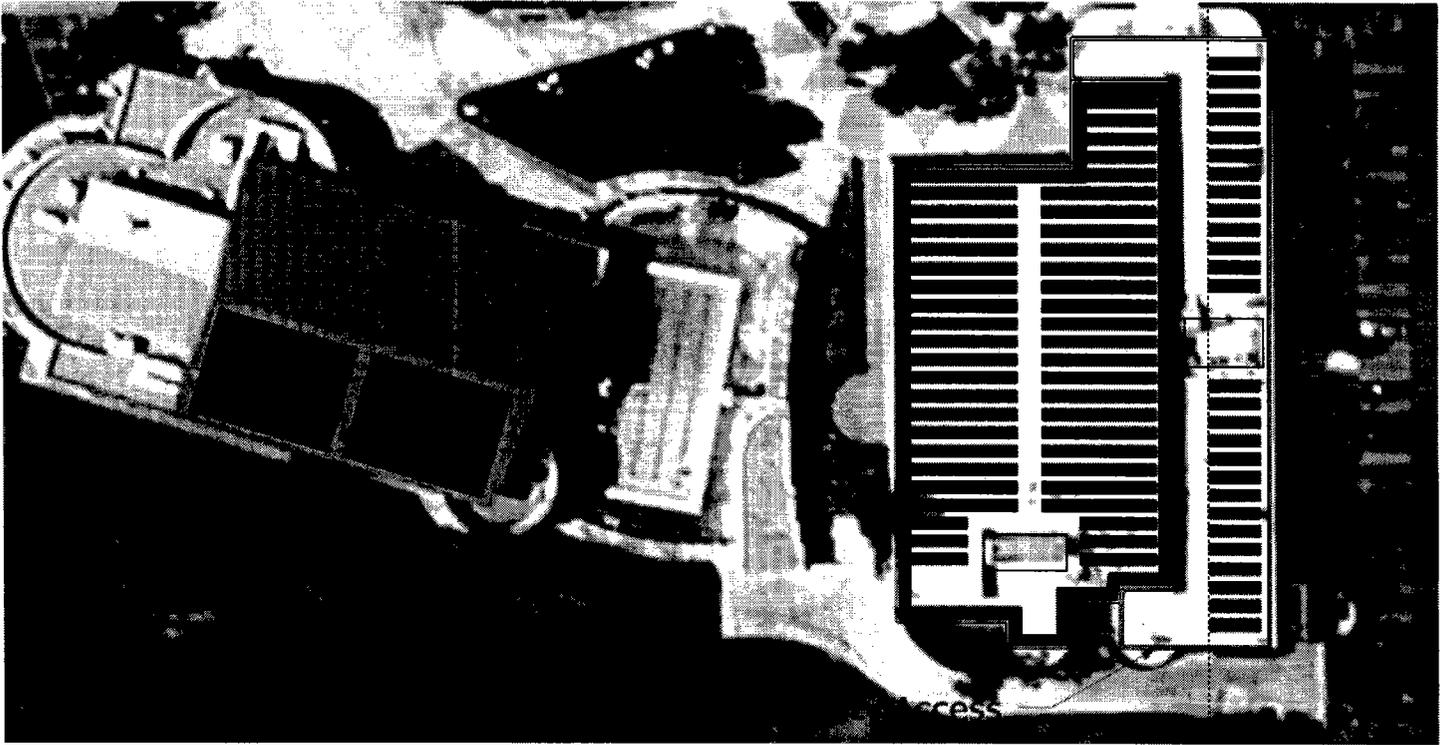


Exhibit 6
Memorandum of License

RECORDING REQUESTED BY AND WHEN)
RECORDED RETURN TO:)
SolarCity Corporation)
393 Vintage Park Drive, Suite 140)
Foster City, CA 94404)
Attention: Lease/License Administrator)

(space above this line reserved for recorder's use)

MEMORANDUM OF LICENSE

THIS MEMORANDUM OF LICENSE is made and entered into this ___ day of _____, 2009, by and between City of Costa Mesa, whose address is 77 Fair Drive 2nd Floor, Costa Mesa, CA 92626 ("Licensor"), and SOLARCITY CORPORATION, whose address is 393 Vintage Park Drive, Suite 140, Foster City, CA 94404 ("Licensee").

- A. Licensor is the owner of certain real property ("Premises"), located in the County of Orange, State of California, described in Exhibit A attached to and incorporated herein by reference.
- B. Licensor and Licensee have entered into a Solar Energy Purchase Agreement dated as of _____, 2009 ("Agreement") under which Licensee is selling energy generated by a photovoltaic electric generating system ("System") to Licensor. The Agreement is for a term of Fifteen(15) years, beginning _____, 2009 and ending on _____, 2024, with an option to extend the Agreement for up to Three (3) extended terms of Five (5) years each. Pursuant to the Agreement, Licensor has granted Licensee an irrevocable, non-exclusive license ("License") over the Premises for the purposes and on the terms set forth in the Agreement.

Licensor and Licensee agree as follows:

- 1. Licensor hereby grants to Licensee the License over the Premises on and subject to the terms and conditions set forth in the Agreement which is incorporated herein by reference.
- 2. The term of the License begins on _____, 2009 and continues until one hundred and twenty (120) days after the termination of the Agreement.
- 3. This Memorandum of License shall not be deemed to modify, alter or amend in any way the provisions of the License or the Agreement. In the event of any conflict between the terms of the License and/or the Agreement and this Memorandum, the terms of the License and/or the Agreement, as applicable, shall control.

The undersigned have executed this Memorandum of License as of the date first written above.

LICENSOR

LICENSEE

City of Costa Mesa

SOLARCITY CORPORATION

By: _____
Name: _____
Title: _____

By: _____
Name: Charles Ferer
Title: CFO

[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK
ACKNOWLEDGEMENT PAGE FOLLOWS]

Exhibit A
To Memorandum of License

Legal Description of Premises

That certain real property located in the County of Orange, State of California, described as follows:

A PARCEL OF LAND LOCATED IN THE STATE OF CALIFORNIA, COUNT OF ORANGE, WITH A SITUS ADDRESS OF, CA CURRENTL OWNED BY CITY OF COSTA MESA HAVING A TAX ASSESSOR NUMBER OF 424-221-22 LOT 13 AND LOTS 14-24 INC POR ABAND ST.
District Recreation Center; 1860 Anaheim

A PARCEL OF LAND LOCATED IN THE STATE OF CALIFORNIA, COUNTY OF ORANGE, WITH A SITUS ADDRESS OF 1860 ANAHEIM AVE, COSTA MESA CA 92627-2707 CURRENTLY OWNED BY COSTA MESA PARK/RECREATION DISTRICT HAVING A TAX ASSESSOR NUMBER OF 424-251-01 AND BEING THE SAME PROPERTY MORE FULLY DESCRIBED AS NEWPORT MESA TR LOT 303 AND 304 AND DESCRIBED IN DOCUMENT NUMBER 723200668 RECORDED 09/24/1964.

Exhibit 7

Solar Power Purchase Agreement General Terms and Conditions

Revised February 16, 2009

1. **Definitions and Interpretation:** Unless otherwise defined or required by the context in which any term appears: (a) the singular includes the plural and vice versa; (b) the words "herein," "hereof" and "hereunder" refer to this Agreement as a whole and not to any particular section or subsection of this Agreement; (c) references to any agreement, document or instrument mean such agreement, document or instrument as amended, modified, supplemented or replaced from time to time; and (d) the words "include," "includes" and "including" mean include, includes and including "without limitation." The captions or headings in this Agreement are strictly for convenience and shall not be considered in interpreting this Agreement.

2. **Purchase and Sale of Electricity.** Purchaser shall purchase from Seller, and Seller shall sell to Purchaser, all of the electric energy generated by the System during the Initial Term and any Additional Term (as defined in Exhibit 1, and collectively the "Term"). Electric energy generated by the System will be delivered to Purchaser at the delivery point identified on Exhibit 4 (the "Delivery Point"). Purchaser shall take title to the electric energy generated by the System at the Delivery Point, and risk of loss will pass from Seller to Purchaser at the Delivery Point. Purchaser may purchase electric energy for the Facility from other sources if the Purchaser's electric requirements at the Facility exceed the output of the System.

3. **Term and Termination.**
 - a. **Initial Term.** The initial term ("Initial Term") of this Agreement shall commence on the Commercial Operation Date (as defined below) and continue for the length of time specified in Exhibit 1, unless earlier terminated as provided for in this Agreement. The "Commercial Operation Date" is the date Seller gives Purchaser written notice that the System is mechanically complete and capable of providing electric energy to the Delivery Point. Upon Purchaser's request, Seller will give Purchaser copies of certificates of completion or similar documentation from Seller's contractor and the interconnection or similar agreement with the Utility. This Agreement is effective as of the Effective Date and Purchaser's failure to enable Seller to provide the electric energy by preventing it from installing the System or otherwise not performing shall not excuse Purchaser's obligations to make payments that otherwise would have been due under this Agreement.

 - b. **Additional Terms.** If Purchaser has not exercised its option to purchase the System by the end of the Initial Term, either Party may give the other Party written notice of its desire to extend this Agreement on the terms and conditions set forth herein for the number and length of additional periods specified in Exhibit 1 (each an "Additional Term"). Such notice shall be given, if at all, not more than one hundred twenty (120) and not less than sixty (60) days before the last day of the Initial Term or the then current Additional Term, as applicable. The Party receiving the notice requesting an Additional Term shall respond positively or negatively to that request in writing within thirty (30) days after receipt of the request. Failure to respond within such thirty (30) day period shall be deemed a rejection of the offer for an Additional Term. If both Parties agree to an Additional Term, the Additional Term shall begin immediately upon the conclusion of the then current term or Additional Term on the same terms and conditions as set forth in this Agreement. If the Party receiving the request for an Additional Term rejects or is deemed to reject the first Party's offer, this Agreement shall terminate at the end of the Initial Term (if the same has not been extended) or the then current Additional Term.

4. **Billing and Payment.**
 - a. **Monthly Charges.** Purchaser shall pay Seller monthly for the electric energy generated by the System and delivered to the Delivery Point at the \$/kWh rate shown in Exhibit 1 (the "Contract Price"). The monthly payment for such energy will be equal to the applicable \$/kWh rate multiplied by the number of kWh of energy generated during the applicable month, as measured by the System meter.

 - b. **Monthly Invoices.** Seller shall invoice Purchaser monthly. Such monthly invoices shall state (i) the amount of electric energy produced by the System and delivered to the Delivery Point, (ii) the rates applicable to, and charges incurred by, Purchaser under this Agreement and (iii) the total amount due from Purchaser.

 - c. **Utility Invoices.** Purchaser shall authorize the Utility to send to Seller duplicates of any bills sent to Purchaser. If Utility does not permit duplicate bills to be sent to Seller, Purchaser shall, promptly upon receipt of each bill, make a

photocopy of each bill and mail the copy to Seller. Purchaser shall pay all charges assessed by the Utility to the Facility.

- e. **Taxes.** Purchaser shall either pay or reimburse Seller for any and all taxes assessed on the generation, sale, delivery or consumption of electric energy produced by the System or the interconnection of the System to the Utility's electric distribution system, including property taxes on the System; provided, however, Purchaser will not be required to pay or reimburse Seller for any taxes during periods when Seller fails to deliver electric energy to Purchaser for reasons other than Force Majeure. For purposes of this Section 4(c), "Taxes" means any federal, state and local ad valorem, property, occupation, generation, privilege, sales, use, consumption, excise, transaction, and other taxes, regulatory fees, surcharges or other similar charges but shall not include any income taxes or similar taxes imposed on net revenues imposed on Seller due to the sale of energy under this Agreement, which shall be Seller's responsibility. Sellers is advised that, pursuant to Revenue and Taxation Code section 107.6, a possessory interest subject to taxation may be created by the creation by the grant of a license under this Agreement and that Seller may be subject to the payment of property taxes levied upon that interest. If such a tax is levied upon Seller, then such cost shall be borne by Purchaser who shall indemnify Seller for any payments made.
- f. **Payment Terms.** All amounts due under this Agreement shall be due and payable net twenty (20) days from receipt of invoice. Any undisputed portion of the invoice amount not paid within the twenty (20) day period shall accrue interest at the annual rate of two and one-half percent (2.5%) over the Prime Rate (but not to exceed the maximum rate permitted by law). Seller shall comply with laws and regulations governing the payment of prevailing wage as identified in the Labor Code and applicable law. If prevailing wage payments are required under this Agreement, then such cost shall be borne by Purchaser who shall indemnify Seller for any payments made.

5. **Environmental Attributes and Environmental Incentives.**

Unless otherwise specified on Exhibit 1, Seller is the owner of all Environmental Attributes and Environmental Incentives and is entitled to the benefit of all Tax Credits, and Purchaser's purchase of electricity under this Agreement does not include Environmental Attributes, Environmental Incentives or the right to Tax Credits or any other attributes of ownership and operation of the System, all of which shall be retained by Seller. Purchaser shall cooperate with Seller in obtaining, securing and transferring all Environmental Attributes and Environmental Incentives and the benefit of all Tax Credits, including by using the electric energy generated by the System in a manner necessary to qualify for such available Environmental Attributes, Environmental Incentives and Tax Credits. Purchaser shall not be obligated to incur any out-of-pocket costs or expenses in connection with such actions unless reimbursed by Seller. If any Environmental Incentives are paid directly to Purchaser, Purchaser shall immediately pay such amounts over to Seller. To avoid any conflicts with fair trade rules regarding claims of solar or renewable energy use, Purchaser, if engaged in commerce and/or trade, shall submit to Seller for approval any press releases regarding Purchaser's use of solar or renewable energy and shall not submit for publication any such releases without the written approval of Seller. Approval shall not be unreasonably withheld, and Seller's review and approval shall be made in a timely manner to permit Purchaser's timely publication.

"**Environmental Attributes**" means any and all credits, benefits, emissions reductions, offsets, and allowances, howsoever entitled, attributable to the System, the production of electrical energy from the System and its displacement of conventional energy generation, including (1) any avoided emissions of pollutants to the air, soil or water such as sulfur oxides (SO_x), nitrogen oxides (NO_x), carbon monoxide (CO) and other pollutants; (2) any avoided emissions of carbon dioxide (CO₂), methane (CH₄), nitrous oxide, hydrofluorocarbons, perfluorocarbons, sulfur hexafluoride and other greenhouse gases (GHGs) that have been determined by the United Nations Intergovernmental Panel on Climate Change, or otherwise by law, to contribute to the actual or potential threat of altering the Earth's climate by trapping heat in the atmosphere; and (3) the reporting rights related to these avoided emissions, such as Green Tag Reporting Rights and Renewable Energy Credits. Green Tag Reporting Rights are the right of a party to report the ownership of accumulated Green Tags in compliance with federal or state law, if applicable, and to a federal or state agency or any other party, and include Green Tag Reporting Rights accruing under Section 1605(b) of The Energy Policy Act of 1992 and any present or future federal, state, or local law, regulation or bill, and international or foreign emissions trading program. Environmental Attributes do not include Environmental Incentives and Tax Credits. Purchaser and Seller shall file all tax returns in a manner consistent with this Paragraph 5. Without limiting the generality of the foregoing, Environmental Attributes include carbon trading credits, renewable energy credits or certificates, emissions reduction credits, investment credits, emissions allowances, green tags, tradeable renewable credits and Green-e® products.

"**Environmental Incentives**" means any and credits, rebates, subsidies, payments or other incentives that relate to self-generation of electricity, the use of technology incorporated into the System, environmental benefits of using the System, or other similar programs available from the Utility, any other regulated entity, the manufacturer of any part of the System or any Governmental Authority.

“**Governmental Authority**” means any national, state or local government (whether domestic or foreign), any political subdivision thereof or any other governmental, quasi-governmental, judicial, public or statutory instrumentality, authority, body, agency, bureau or entity (including the Federal Energy Regulatory Commission or the California Public Utilities Commission), or any arbitrator with authority to bind a party at law.

“**Tax Credits**” means any and all (i) investment tax credits, (ii) production tax credits and (iii) similar tax credits under federal, state or local law relating to the construction, ownership or production of energy from the System.

6. Conditions to Obligations.

a. Conditions to Seller’s Obligations.

Seller’s obligations under this Agreement are conditioned on the completion of the following conditions to Seller’s reasonable satisfaction on or before the Condition Satisfaction Date:

- i. Completion of a physical inspection of the Facility and the property upon which the Facility is located (the “**Premises**”) including, if applicable, geotechnical work, and real estate due diligence to confirm the suitability of the Facility and the Premises for the System;
- ii. Approval of (i) this Agreement and (ii) the Construction Agreement (if any) for the System by Seller’s Financing Parties. “**Construction Agreement**” as used in this subsection means an agreement between SolarCity and a subcontractor to install the System.
- iii. Confirmation that Seller will obtain all applicable Environmental Incentives and Tax Credits;
- iv. Receipt of all necessary zoning, land use and building permits; and
- v. Execution of all necessary agreements with the Utility for interconnection of the System to the Utility’s electric distribution system.
- vi. Prior to Seller commencing construction and installation of the System, Purchaser shall give Seller proof of insurance for all insurance required to be maintained by Purchaser under this Agreement.

b. Conditions to Purchaser’s Obligations.

- i. Purchaser’s obligations under this Agreement are conditioned on the occurrence of the Commercial Operation Date for the System on or before the Outside Commercial Operation Date (See **Exhibit 1**).

c. Failure of Conditions.

If any of the conditions listed in subsections a) or b) above are not satisfied by the applicable dates specified in those subsections, the Parties will attempt in good faith to negotiate new dates for the satisfaction of the failed conditions. If the parties are unable to negotiate new dates then the Party that has not failed to meet an obligation may terminate this Agreement upon ten (10) days written notice to the other Party without liability for costs or damages or triggering a default under this Agreement.

7. Seller’s Rights and Obligations.

a. Permits and Approvals. Seller, with Purchaser’s reasonable cooperation, shall use commercially reasonable efforts to obtain, at its sole cost and expense:

- i. any zoning, land use and building permits required to construct, install and operate the System; and
- ii. any agreements and approvals from the Utility necessary in order to interconnect the System to the Utility’s electric distribution system.

Purchaser shall cooperate with Seller’s reasonable requests to assist Seller in obtaining such agreements, permits and approvals.

- b. **Standard System Repair and Maintenance.** Seller shall construct and install the System at the Facility. During the Term, Seller will operate and perform all routine and emergency repairs to and maintenance of the System at its sole cost and expense, except for any repairs or maintenance resulting from Purchaser's negligence, willful misconduct or breach of this Agreement or the Site Lease (if applicable). Seller shall not be responsible for any work done by others on any part of the System unless Seller authorizes that work in advance in writing. Seller shall not be responsible for any loss, damage, cost or expense arising out of or resulting from improper environmental controls or improper operation or maintenance of the System by anyone other than Seller or Seller's contractors. If the System requires repairs for which Seller is not responsible, Purchaser shall pay Seller for diagnosing and correcting the problem at Seller or Seller's contractors' then current standard rates. Seller shall provide Purchaser with reasonable notice prior to accessing the Facility to make standard repairs.
- c. **Non-Standard System Repair and Maintenance.** If Seller incurs incremental costs to maintain the System due to conditions at the Facility or due to the inaccuracy of any information provided by Purchaser and relied upon by Seller, the pricing, schedule and other terms of this Agreement will be equitably adjusted to compensate for any work in excess of normally expected work required to be performed by Seller. In such event, the Parties will negotiate such equitable adjustment in good faith.
- d. **Breakdown Notice.** Seller shall notify Purchaser within twenty-four (24) hours following Seller's discovery of (a) any material malfunction in the operation of the System or (b) an interruption in the supply of electrical energy from the System. Purchaser and Seller shall each designate personnel and establish procedures such that each Party may provide notice of such conditions requiring Seller's repair or alteration at all times, twenty-four (24) hours per day, including weekends and holidays. Purchaser shall notify Seller immediately upon the discovery of an emergency condition affecting the System.
- e. **Suspension.** Notwithstanding anything to the contrary herein, Seller shall be entitled to suspend delivery of electricity from the System to the Delivery Point for the purpose of maintaining and repairing the System and such suspension of service shall not constitute a breach of this Agreement; provided, that Seller shall use commercially reasonable efforts to minimize any interruption in service to the Purchaser.
- f. **Use of Contractors and Subcontractors.** Seller shall be permitted to use contractors and subcontractors to perform its obligations under this Agreement. However, Seller shall continue to be responsible for the quality of the work performed by its contractors and subcontractors. If a list of pre-approved contractors and subcontractors is desired, such list shall be scheduled on an appendix to Exhibit 7. All Contractors and subcontractors other than those that may be scheduled on an appendix to Exhibit 7 shall be subject to Purchaser's prior written consent, not to be unreasonably withheld.
- g. **Liens and Payment of Contractors and Suppliers.** Seller shall pay when due all valid charges from all contractors, subcontractors and suppliers supplying goods or services to Seller under this Agreement and shall keep the Facility free and clear of any liens related to such charges, except for those liens which Seller is permitted by law to place on the Facility following non-payment by Purchaser of amounts due under this Agreement. Seller shall indemnify Purchaser for all claims, losses, damages, liabilities and expenses resulting from any liens filed against the Facility or the Premises in connection with such charges; provided, however, that Seller shall have the right to contest any such lien, so long as it provides a statutory bond or other reasonable assurances of payment that either remove such lien from title to the Facility and the Premises or that assure that any adverse judgment with respect to such lien will be paid without affecting title to the Facility and the Premises.
- h. **No Warranty.** NO WARRANTY OR REMEDY, WHETHER STATUTORY, WRITTEN, ORAL, EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE, OR WARRANTIES ARISING FROM COURSE OF DEALING OR USAGE OF TRADE SHALL APPLY. The remedies set forth in this Agreement shall be Purchaser's sole and exclusive remedies for any claim or liability arising out of or in connection with this Agreement, whether arising in contract, tort (including negligence), strict liability or otherwise.

8. **Purchaser Rights and Obligations.**

- a. **Facility Access Rights.** Purchaser grants to Seller and to Seller's agents, employees and contractors an irrevocable non-exclusive license running with the Premises (the "License") for access to, on, over, under and across the Premises as more particularly described in Exhibit 5 (the "License Area") for the purposes of (a) installing, constructing, operating, owning, maintaining, accessing, removing and replacing the System; (b) performing all of Seller's obligations and enforcing all of Seller's rights set forth in this Agreement; and (c) installing, using and maintaining electric lines and equipment, including inverters and meters, necessary to interconnect the System to

Purchaser's electric system at the Facility and/or to the Utility's electric distribution system or that otherwise may from time to time be useful or necessary in connection with the construction, installation, operation, maintenance or repair of the System. Seller shall notify Purchaser prior to entering the Facility except in situations where there is imminent risk of damage to persons or property. The term of the License shall continue until the date that is one hundred and twenty (120) days following the date of expiration or termination of this Agreement (the "**License Term**"). During the License Term, Purchaser shall ensure that Seller's rights under the License and Seller's access to the License Area are preserved and protected and shall not interfere with or permit any third parties to interfere with such rights or access. The grant of the License shall survive termination of this agreement by either Party. Purchaser agrees that Seller may record a memorandum of license in substantially the same form attached hereto as **Exhibit 6** in the land records respecting the License.

- b. **OSHA Compliance.** Purchaser shall ensure that all Occupational Safety and Health Act (OSHA) requirements and other similar applicable safety laws or codes are adhered to in its performance under this Agreement.
- c. **Maintenance of Facility.** Purchaser shall, at its sole cost and expense, maintain the Facility in good condition and repair. Purchaser will ensure that the Facility remains interconnected to the local utility grid at all times and will not permit cessation of electric service to the Facility from the local utility. Purchaser is fully responsible for the maintenance and repair of the Facility's electrical system and of all of Purchaser's equipment that utilizes the System's outputs. Purchaser shall properly maintain in full working order all of Purchaser's electric supply or generation equipment that Purchaser may shut down while utilizing the System. Purchaser shall promptly notify Seller of any matters of which it is aware pertaining to any damage to or loss of use of the System or that could reasonably be expected to adversely affect the System.
- d. **No Alteration of Facility.** Purchaser shall not make any alterations or repairs to the Facility which may adversely affect the operation and maintenance of the System without Seller's prior written consent. If Purchaser wishes to make such alterations or repairs, Purchaser shall give prior written notice to Seller, setting forth the work to be undertaken (except for emergency repairs, for which notice may be given by telephone), and give Seller the opportunity to advise Purchaser in making such alterations or repairs in a manner that avoids damage to the System, but, notwithstanding any such advice, Purchaser shall be responsible for all damage to the System caused by Purchaser or its contractors. To the extent that temporary disconnection or removal of the System is necessary to perform such alterations or repairs, such work and any replacement of the System after completion of Purchaser's alterations and repairs, shall be done by Seller or its contractors at Purchaser's cost. All of Purchaser's alterations and repairs will be done in a good and workmanlike manner and in compliance with all applicable laws, codes and permits.
- e. **Outages.** Purchaser shall be permitted to be off line for two (2) full twenty-four (24) hour days (each, a "**Scheduled Outage**") per calendar year during the Term, during which days Purchaser shall not be obligated to accept or pay for electricity from the System; provided, however, that Purchaser must notify Seller in writing of each such Scheduled Outage at least forty-eight (48) hours in advance of the commencement of a Scheduled Outage. In the event that Scheduled Outages exceed two (2) days per calendar year or there are unscheduled outages, in each case for a reason other than a Force Majeure event, Seller shall reasonably estimate the amount of electricity that would have been delivered to Purchaser during such excess Scheduled Outages or unscheduled outages and shall invoice Purchaser for such amount in accordance with Section 4.
- f. **Liens.** Purchaser shall not directly or indirectly cause, create, incur, assume or allow to exist any mortgage, pledge, lien, charge, security interest, encumbrance or other claim of any nature on or with respect to the System or any interest therein. Purchaser shall immediately notify Seller in writing of the existence of any such mortgage, pledge, lien, charge, security interest, encumbrance or other claim, shall promptly cause the same to be discharged and released of record without cost to Seller, and shall indemnify Seller against all costs and expenses (including reasonable attorneys' fees) incurred in discharging and releasing any such mortgage, pledge, lien, charge, security interest, encumbrance or other claim.
- g. **Security.** Purchaser shall be responsible for maintaining the physical security of the License Area and for any damage or vandalism to the System as a result of failure to maintain such security. Purchaser will not conduct activities on, in or about the License Area or the Facility that have a reasonable likelihood of causing damage, impairment or otherwise adversely affecting the System. Purchaser shall provide and take reasonable measures for security of the System, including commercially reasonable monitoring of the Facility's alarms.
- h. **Insolation.** Purchaser understands that unobstructed access to sunlight ("**Insolation**") is essential to Seller's performance of its obligations and a material term of this Agreement. Purchaser shall not in any way cause and, where possible, shall not in any way permit any interference with the System's Insolation. If Purchaser becomes

aware of any activity or condition that could diminish the Insulation of the System, Purchaser shall notify Seller immediately and shall cooperate with Seller in preserving the System's existing Insulation levels. The Parties agree that reducing Insulation would irreparably injure Seller, that such injury may not be adequately compensated by an award of money damages, and that Seller is entitled to seek specific enforcement of this Section 8(h) against Purchaser.

- i. **Data Line.** Purchaser shall provide Seller a high speed internet data line during the Term to enable Seller to record the electric energy generated by the System. If Purchaser fails to provide such high speed internet data line, or if such line ceases to function and is not repaired, Seller may reasonably estimate the amount of electric energy that was generated and invoice Purchaser for such amount in accordance with Section 4.
- j. **Breakdown Notice.** Purchaser shall notify Seller within twenty-four (24) hours following the discovery by it of (A) any material malfunction in the operation of the System; or (B) any occurrences that could reasonably be expected to adversely affect the System. Purchaser shall notify Seller immediately upon (A) an interruption in the supply of electrical energy from the System; or (B) the discovery of an emergency condition respecting the System. Purchaser and Seller shall each designate personnel and establish procedures such that each Party may provide notice of such conditions requiring Seller's repair or alteration at all times, twenty-four (24) hours per day, including weekends and holidays.

9. **Change in Law.**

"Change in Law" means (i) the enactment, adoption, promulgation, modification or repeal after the Effective Date of any applicable law or regulation; (ii) the imposition of any material conditions on the issuance or renewal of any applicable permit after the Effective Date of this Agreement (notwithstanding the general requirements contained in any applicable Permit at the time of application or issue to comply with future laws, ordinances, codes, rules, regulations or similar legislation), or (iii) a change in any utility rate schedule or tariff approved by any Governmental Authority which in the case of any of (i), (ii) or (iii), establishes requirements affecting owning, supplying, constructing, installing, operating or maintaining the System, or other performance of the Seller's obligations hereunder and which has a material adverse effect on the cost to Seller of performing such obligations; provided, that a change in federal, state, county or any other tax law after the Effective Date of this Agreement shall not be a Change in Law pursuant to this Agreement.

If any Change in Law occurs that has a material adverse effect on the cost to Seller of performing its obligations under this Agreement, then the Parties shall, within thirty (30) days following receipt by Purchaser from Seller of notice of such Change in Law, meet and attempt in good faith to negotiate amendments to this Agreement as are reasonably necessary to preserve the economic value of this Agreement to both Parties. If the Parties are unable to agree upon such amendments within such thirty (30) day period, then Seller shall have the right to terminate this Agreement without further liability to either Party except with respect to payment of amounts accrued prior to termination.

10. **Relocation of System.**

If Purchaser ceases to conduct business operations at and/or vacates the Facility or is prevented from operating the System at the Facility prior to the expiration of the Term, Purchaser shall have the option to provide Seller with a mutually agreeable substitute premises located within the same Utility district as the terminated System or in a location with similar Utility rates and Insulation. Purchaser shall provide at least sixty (60) but not more than one hundred eighty (180) days prior written notice prior to the date that it wants to make this substitution. In connection with such substitution, Purchaser shall execute an amended agreement that shall have all of the same terms as this Agreement except for the (i) Effective Date; (ii) License, which will be amended to grant rights in the real property where the System relocated to; and (iii) Term, which will be the remainder of the Term of this Agreement and such amended agreement shall be deemed to be a continuation of this Agreement without termination. Purchaser shall also provide any new Purchaser, owner, lessor or mortgagee consents or releases required by Seller or Seller's Financing Parties in connection with the substitute facility. Purchaser shall pay all costs associated with relocation of the System, including all costs and expenses incurred by or on behalf of Seller in connection with removal of the System from the Facility and installation and testing of the System at the substitute facility and all applicable interconnection fees and expenses at the substitute facility, as well as costs of new title search and other out-of-pocket expenses connected to preserving and refiling the security interests of Seller's Financing Parties in the System. Seller shall remove the System from the vacated Facility prior to the termination of Purchaser's ownership, lease or other rights to use such Facility. Seller will not be required to restore the Facility to its prior condition but shall promptly pay Purchaser for any damage caused by Seller during removal of the System, but not for normal wear and tear. If the substitute facility has inferior Insulation as compared to the original Facility, Seller shall have the right to make an adjustment to Exhibit 1 such that Purchaser's payments to Seller are the same as if the System were located at the original Facility. If Purchaser is unable to provide such substitute Facility and to relocate the System as provided, any early termination will be treated as a default by Purchaser.

11. Removal of System at Expiration.

Upon the expiration or earlier termination of this Agreement (provided Purchaser does not exercise its purchase option), Seller shall, at its expense, remove all of its tangible property comprising the System from the Facility on a mutually convenient date but in no event later than ninety (90) days after the expiration of the Term. The Facility shall be returned to its original condition, except for System mounting pads or other support structures, which may be left in place, and ordinary wear and tear. In no case shall Seller's removal of the System affect the integrity of Purchaser's roof, which shall be as leak proof as it was prior to removal of the System. Seller shall leave the Facility in neat and clean order. If Seller fails to remove or commence substantial efforts to remove the System by such agreed upon date, Purchaser shall have the right, at its option, to remove the System to a public warehouse and restore the Facility to its original condition (other than System mounting pads or other support structures and ordinary wear and tear) at Seller's cost. Purchaser shall provide sufficient space for the temporary storage and staging of tools, materials and equipment and for the parking of construction crew vehicles and temporary construction trailers and facilities reasonably necessary during System removal.

12. Measurement.

Electricity delivered to the Facility shall be measured by the SolarGuard monitoring system installed and maintained by Seller as part of the System.

13. Default, Remedies and Damages.

a. **Default.** Any Party that fails to perform its responsibilities as listed below or experiences any of the circumstances listed below shall be deemed a "**Defaulting Party**" and each event of default shall be a "**Default Event**":

- (1) failure of a Party to pay any amount due and payable under this Agreement, other than an amount that is subject to a good faith dispute, within ten (10) days following receipt of written notice from the other Party (the "**Non-Defaulting Party**") of such failure to pay ("**Payment Default**");
- (2) failure of a Party to substantially perform any other material obligation under this Agreement within thirty (30) days following receipt of written notice from the Non-Defaulting Party demanding such cure; provided, that such thirty (30) day cure period shall be extended (but not beyond ninety (90) days) if and to the extent reasonably necessary to cure the Default Event, if (i) the Defaulting Party initiates such cure with the thirty (30) day period and continues such cure to completion and (ii) there is no material adverse affect on the Non-Defaulting Party resulting from the failure to cure the Default Event;
- (3) if any representation or warranty of a Party proves at any time to have been incorrect in any material respect when made and is material to the transactions contemplated hereby, if the effect of such incorrectness is not cured within thirty (30) days following receipt of written notice from the Non-Defaulting Party demanding such cure;
- (4) Purchaser loses its rights to occupy and enjoy the Premises; or
- (5) a Party, or its guarantor, becomes insolvent or is a party to a bankruptcy, reorganization, insolvency, liquidation, receivership, dissolution, winding-up or relief of debtors, or any general assignment for the benefit of creditors or other similar arrangement or any event occurs or proceedings are taken in any jurisdiction with respect to the Party which has a similar effect.
- (6) Purchaser prevents Seller from installing the System or otherwise failing to perform in a way that prevents the delivery of electric energy from the System. (Such Default Event shall not excuse Purchaser's obligations to make payments that otherwise would have been due under this Agreement.)

b. **Remedies.**

- (1) **Remedies for Payment Default.** If a Payment Default occurs, the Non-Defaulting Party may suspend performance of its obligations under this Agreement. Further, the Non-Defaulting Party may pursue any remedy under this Agreement, at law or in equity, including an action for damages and termination of this Agreement, upon five (5) days prior written notice to the Defaulting Party following the Payment Default.

- (2) **Remedies for Other Defaults.** On the occurrence of a Default Event other than a Payment Default, the Non-Defaulting Party may pursue any remedy under this Agreement, at law or in equity, including an action for damages and termination of this Agreement or suspension of performance of its obligations under this Agreement, upon five (5) days prior written notice to the Defaulting Party following the occurrence of the Default Event. Nothing herein shall limit either Party's right to collect damages upon the occurrence of a breach or a default by the other Party that does not become a Default Event.
- (3) **Damages Upon Termination by Default.** Upon a termination of this Agreement by the Non-Defaulting Party as a result of a Default Event by the Defaulting Party, the Defaulting Party shall pay a Termination Payment to the Non-Defaulting Party determined as follows (the "**Termination Payment**"):
 - A. **Purchaser.** If Purchaser is the Defaulting Party and Seller terminates this Agreement, the Termination Payment to Seller shall be equal to the sum of (i) the termination value set forth in **Exhibit 1** (the "**Termination Value**") for such Contract Year, (ii) removal costs as provided in **Section 13(b)(3)(C)** and (iii) any and all other amounts previously accrued under this Agreement and then owed by Purchaser to Seller. The Parties agree that actual damages to Seller in the event this Agreement terminates prior to the expiration of the Term as the result of an Default Event by Purchaser would be difficult to ascertain, and the applicable Termination Value set forth in **Exhibit 1** is a reasonable approximation of the damages suffered by Seller as a result of early termination of this Agreement. The Termination Payment shall not be less than zero.
 - B. **Seller.** If Seller is the Defaulting Party and Purchaser terminates this Agreement, the Termination Payment to Purchaser shall be equal to the sum of (i) the present value (using a discount rate of 9.5%) of the excess, if any, of the reasonably expected cost of electric energy from the Utility over the Contract Price for the reasonably expected production of the Facility for the remainder of the Initial Term or the then current Additional Term, as applicable; (ii) all costs reasonably incurred by Purchaser in re-converting its electric supply to service from the Utility; (iii) any removal costs incurred by Purchaser, and (iv) any and all other amounts previously accrued under this Agreement and then owed by Seller to Purchaser. The Termination Payment shall not be less than zero.
 - C. **Obligations Following Termination.** If a Non-Defaulting Party terminates this Agreement pursuant to this **Section 13(b)(3)(C)**, then following such termination, Seller shall, at the sole cost and expense of the Defaulting Party, remove the equipment (except for mounting pads and support structures) constituting the System. The Non-Defaulting Party shall take all commercially reasonable efforts to mitigate its damages as the result of a Default Event.

14. **Representations and Warranties.**

a. **General Representations and Warranties.** Each Party represents and warrants to the other the following:

- (1) Such Party is duly organized, validly existing and in good standing under the laws of the jurisdiction of its formation; the execution, delivery and performance by such Party of this Agreement have been duly authorized by all necessary corporate, partnership or limited liability company action, as applicable, and do not and shall not violate any law; and this Agreement is valid obligation of such Party, enforceable against such Party in accordance with its terms (except as may be limited by applicable bankruptcy, insolvency, reorganization, moratorium and other similar laws now or hereafter in effect relating to creditors' rights generally).
- (2) Such Party has obtained all licenses, authorizations, consents and approvals required by any Governmental Authority or other third party and necessary for such Party to own its assets, carry on its business and to execute and deliver this Agreement; and such Party is in compliance with all laws that relate to this Agreement in all material respects.

b. **Purchaser's Representations and Warranties.** Purchaser represents and warrants to Seller the following:

- (1) License. Purchaser has the full right, power and authority to grant the License contained in Section 8(a). Such grant of the License does not violate any law, ordinance, rule or other governmental restriction applicable to Purchaser or the Facility and is not inconsistent with and will not result in a breach or default under any agreement by which Purchaser is bound or that affects the Facility.
- (2) Other Agreements. Neither the execution and delivery of this Agreement by Purchaser nor the performance by Purchaser of any of its obligations under this Agreement conflicts with or will result in a breach or default under any agreement or obligation to which Purchaser is a party or by which Purchaser or the Facility is bound.
- (3) Accuracy of Information. All information provided by Purchaser to Seller, as it pertains to the Facility's physical configuration, Purchaser's planned use of the Facility, and Purchaser's estimated electricity requirements, is accurate in all material respects.
- (4) Purchaser Status. Purchaser is not a public utility or a public utility holding company and is not subject to regulation as a public utility or a public utility holding company.
- (5) No Pool Use. No electricity generated by the System will be used to heat a swimming pool.

15. System Damage and Insurance.

a. System Damage.

- (1) Seller's Obligations. If the System is damaged or destroyed other than by Purchaser's negligence or willful misconduct, Seller shall promptly repair and restore the System to its pre-existing condition; provided, however, that if more than fifty percent (50%) of the System is destroyed during the last five (5) years of the Initial Term or during any Additional Term, Seller shall not be required to restore the System, but may instead terminate this Agreement, unless Purchaser agrees (i) to pay for the cost of such restoration of the System or (ii) to purchase the System "AS-IS" at the greater of (A) then current fair market value of the System and (B) the sum of the amounts described in Section 13.b(3)A(i) (using the date of purchase to determine the appropriate Contract Year) and Section 13.b(3)A(iii).
- (2) Purchaser's Obligations. If the Facility is damaged or destroyed by casualty of any kind or any other occurrence other than Seller's negligence or willful misconduct, such that the operation of the System and/or Purchaser's ability to accept the electric energy produced by the System are materially impaired or prevented, Purchaser shall promptly repair and restore the Facility to its pre-existing condition; provided, however, that if more than 50% of the Facility is destroyed during the last five years of the Initial Term or during any Additional Term, Purchaser may elect either (i) to restore the Facility or (ii) to pay the Termination Value set forth in Exhibit 1 and all other costs previously accrued but unpaid under this Agreement and thereupon terminate this Agreement.

b. Insurance Coverage. At all times during the Term, Seller and Purchaser shall maintain the following insurance:

- i. Seller's Insurance. Seller shall maintain (i) comprehensive general liability insurance with coverage of at least \$1,000,000 per occurrence and \$2,000,000 annual aggregate, (ii) employer's liability insurance with coverage of at least \$1,000,000 and (iii) worker's compensation insurance as required by law.
- ii. Purchaser's Insurance. Purchaser shall maintain (i) "all risk" property insurance on the System for the full replacement cost thereof and name Seller as a loss payee, (ii) comprehensive general liability insurance with coverage of at least \$1,000,000 per occurrence and \$2,000,000 annual aggregate, (iii) employer's liability insurance with coverage of at least \$1,000,000 and (iv) worker's compensation insurance as required by law.

c. Policy Provisions. All insurance policies provided hereunder shall (i) contain a provision whereby the insurer agrees to give the party not providing the insurance thirty (30) days (ten (10) days in the event of non-payment of premiums) written notice before the insurance is cancelled, terminated or materially altered, (ii) be written on an occurrence basis, (iii) with respect to the casualty insurance policies, name Seller as loss payee thereunder, (iv) with

respect to the liability insurance policies, include the other Party as an additional insured as its interest may appear, (iv) include waivers of subrogation, (v) provide for primary coverage without right of contribution from any insurance of the other Party, and (vi) be maintained with companies either rated no less than A- as to Policy Holder's Rating in the current edition of Best's Insurance Guide or otherwise reasonably acceptable to the other party.

- d. **Certificates.** Within thirty (30) days after execution of this Agreement and upon the other Party's request and annually thereafter, each Party shall deliver the other Party certificates of insurance evidencing the above required coverage.
- e. **Deductibles.** Unless and to the extent that a claim is covered by an indemnity set forth in this Agreement, each Party shall be responsible for the payment of its own deductibles.

16. Ownership; Option to Purchase.

- a. **Ownership of System.** Throughout the Term, Seller shall be the legal and beneficial owner of the System at all times, including all Environmental Attributes, and the System shall remain the personal property of Seller and shall not attach to or be deemed a part of, or fixture to, the Facility or the Premises. Each of the Seller and Purchaser agree that the Seller is the tax owner of the System and all tax filings and reports will be filed in a manner consistent with this Agreement. The System shall at all times retain the legal status of personal property as defined under Article 9 of the Uniform Commercial Code. Purchaser covenants that it will use commercially reasonable efforts to place all parties having an interest in or a mortgage, pledge, lien, charge, security interest, encumbrance or other claim of any nature on the Facility or the Premises on notice of the ownership of the System and the legal status or classification of the System as personal property. If there is any mortgage or fixture filing against the Premises which could reasonably be construed as prospectively attaching to the System as a fixture of the Premises, Purchaser shall provide a disclaimer or release from such lienholder. If Purchaser is the fee owner of the Premises, Purchaser consents to the filing of a disclaimer of the System as a fixture of the Premises in the office where real estate records are customarily filed in the jurisdiction where the Facility is located. If Purchaser is not the fee owner, Purchaser will obtain such consent from such owner. Purchaser agrees to deliver to Seller a non-disturbance agreement in a form reasonably acceptable to Seller from the owner of the Facility (if the Facility is leased by Purchaser), any mortgagee with a lien on the Premises, and other Persons holding a similar interest in the Premises.
- b. **Option to Purchase.** At the end of the sixth (6th) and tenth (10th) Contract Years and at the end of the Initial Term and each Additional Term, so long as Purchaser is not in default under this Agreement, Purchaser may purchase the System from Seller on any such date for a purchase price equal to (i) with respect to an option exercised at the end of the sixth (6th) or tenth (10th) Contract Years or at the end of the Initial Term, the greater of (A) the amount set forth at such time in the Purchase Option Price schedule in **Exhibit 1**, and (B) the Fair Market Value of the System, and (ii) with respect to an option exercised at the end of an Additional Term, the Fair Market Value of the System. The "Fair Market Value" of the System shall be determined by mutual agreement of Purchaser and Seller; provided, however, if Purchaser and Seller cannot agree to a Fair Market Value within thirty (30) days after Purchaser has exercised its option, the Parties shall select a nationally recognized independent appraiser with experience and expertise in the solar photovoltaic industry to determine the Fair Market Value of the System. Such appraiser shall act reasonably and in good faith to determine the Fair Market Value of the System on an installed basis and shall set forth such determination in a written opinion delivered to the Parties. The valuation made by the appraiser shall be binding upon the Parties in the absence of fraud or manifest error. The costs of the appraisal shall be borne by the Parties equally. Purchaser must provide a notification to Seller of its intent to purchase at least ninety (90) days and not more than one hundred eighty (180) days prior to the end of the applicable Contract Year or the Initial Term or Additional Term, as applicable, and the purchase shall be complete prior to the end of the applicable Contract Year or the Initial Term or Additional Term, as applicable. Upon purchase of the System, Purchaser will assume complete responsibility for the operation and maintenance of the System and liability for the performance of the System, and Seller shall have no further liabilities or obligations hereunder.

17. Indemnification and Limitations of Liability.

- a. **General.** Each Party (the "Indemnifying Party") shall defend, indemnify and hold harmless the other Party and the directors, officers, shareholders, partners, members, agents and employees of such other Party, and the respective affiliates of each thereof (collectively, the "Indemnified Parties"), from and against all loss, damage, expense, liability and other claims, including court costs and reasonable attorneys' fees (collectively, "Liabilities") resulting from any third party actions relating to the breach of any representation or warranty set forth in **Section 14** and from injury to or death of persons, and damage to or loss of property to the extent caused by or arising out of the negligent acts or omissions of, or the willful misconduct of, the Indemnifying Party (or its contractors, agents or employees) in

connection with this Agreement; provided, however, that nothing herein shall require the Indemnifying Party to indemnify the Indemnified Party for any Liabilities to the extent caused by or arising out of the negligent acts or omissions of, or the willful misconduct of, the Indemnified Party. This Section 17(a) however, shall not apply to liability arising from any form of hazardous substances or other environmental contamination, such matters being addressed exclusively by Section 17(c).

b. **Notice and Participation in Third Party Claims.** The Indemnified Party shall give the Indemnifying Party written notice with respect to any Liability asserted by a third party (a "Claim"), as soon as possible upon the receipt of information of any possible Claim or of the commencement of such Claim. The Indemnifying Party may assume the defense of any Claim, at its sole cost and expense, with counsel designated by the Indemnifying Party and reasonably satisfactory to the Indemnified Party. The Indemnified Party may, however, select separate counsel if both Parties are defendants in the Claim and such defense or other form of participation is not reasonably available to the Indemnifying Party. The Indemnifying Party shall pay the reasonable attorneys' fees incurred by such separate counsel until such time as the need for separate counsel expires. The Indemnified Party may also, at the sole cost and expense of the Indemnifying Party, assume the defense of any Claim if the Indemnifying Party fails to assume the defense of the Claim within a reasonable time. Neither Party shall settle any Claim covered by this Section 17(b) unless it has obtained the prior written consent of the other Party, which consent shall not be unreasonably withheld or delayed. The Indemnifying Party shall have no liability under this Section 17(b) for any Claim for which such notice is not provided if that the failure to give notice prejudices the Indemnifying Party.

c. **Environmental Indemnification.** Seller shall indemnify, defend and hold harmless all of Purchaser's Indemnified Parties from and against all Liabilities arising out of or relating to the existence at, on, above, below or near the License Area of any Hazardous Substance (as defined in Section 17(c)(i)) to the extent deposited, spilled, released or otherwise caused by Seller or any of its contractors or agents. Purchaser shall indemnify, defend and hold harmless all of Seller's Indemnified Parties from and against all Liabilities arising out of or relating to the existence at, on, above, below or near the Premises of any Hazardous Substance, except to the extent deposited, spilled, released or otherwise caused by Seller or any of its contractors or agents. Each Party shall promptly notify the other Party if it becomes aware of any deposit, spill or release of any Hazardous Substance on or about the License Area or the Premises generally.

i. **"Hazardous Substance"** means any chemical, waste or other substance (a) which now or hereafter becomes defined as or included in the definition of "hazardous substances," "hazardous wastes," "hazardous materials," "extremely hazardous wastes," "restricted hazardous wastes," "toxic substances," "toxic pollutants," "pollution," "pollutants," "regulated substances," or words of similar import under any laws pertaining to the environment, health, safety or welfare, (b) which is declared to be hazardous, toxic, or polluting by any Governmental Authority, (c) exposure to which is now or hereafter prohibited, limited or regulated by any Governmental Authority, (d) the storage, use, handling, disposal or release of which is restricted or regulated by any Governmental Authority, or (e) for which remediation or cleanup is required by any Governmental Authority.

d. **Limitations on Liability.**

i. **No Consequential Damages.** Neither Party nor its directors, officers, shareholders, partners, members, agents and employees subcontractors or suppliers shall be liable for any indirect, special, incidental, exemplary, or consequential loss or damage of any nature arising out of their performance or non-performance hereunder even if advised of such.

ii. **Actual Damages.** Seller's aggregate liability under this Agreement arising out of or in connection with the performance or non-performance of this Agreement shall not exceed the *lesser* of (A) the total payments made by Purchaser under this Agreement as of the date that the events that first gave rise to such liability occurred; and (B) the total of the prior twelve (12) monthly payments preceding the date that the events that first gave rise to such liability occurred. The provisions of this Section (17)(d)(ii) shall apply whether such liability arises in contract, tort (including negligence), strict liability or otherwise. Any action against Seller must be brought within one (1) year after the cause of action accrues.

18. **Force Majeure.**

a. **"Force Majeure"** means any event or circumstances beyond the reasonable control of and without the fault or negligence of the Party claiming Force Majeure. It shall include, without limitation, failure or interruption of the production, delivery or acceptance of electricity due to: an act of god; war (declared or undeclared); sabotage; riot; insurrection; civil unrest or disturbance; military or guerilla action; terrorism; economic sanction or embargo; civil

strike, work stoppage, slow-down, or lock-out; explosion; fire; earthquake; abnormal weather condition or actions of the elements; hurricane; flood; lightning; wind; drought; the binding order of any Governmental Authority (provided that such order has been resisted in good faith by all reasonable legal means); the failure to act on the part of any Governmental Authority (provided that such action has been timely requested and diligently pursued); unavailability of electricity from the utility grid, equipment, supplies or products (but not to the extent that any such availability of any of the foregoing results from the failure of the Party claiming Force Majeure to have exercised reasonable diligence); and failure of equipment not utilized by or under the control of the Party claiming Force Majeure.

- b. Except as otherwise expressly provided to the contrary in this Agreement, if either Party is rendered wholly or partly unable to timely perform its obligations under this Agreement because of a Force Majeure event, that Party shall be excused from the performance affected by the Force Majeure event (but only to the extent so affected) and the time for performing such excused obligations shall be extended as reasonably necessary; provided, that: (i) the Party affected by such Force Majeure event, as soon as reasonably practicable after obtaining knowledge of the occurrence of the claimed Force Majeure event, gives the other Party prompt oral notice, followed by a written notice reasonably describing the event; (ii) the suspension of or extension of time for performance is of no greater scope and of no longer duration than is required by the Force Majeure event; and (iii) the Party affected by such Force Majeure event uses all reasonable efforts to mitigate or remedy its inability to perform as soon as reasonably possible. Seller shall not be liable for any damage to the System or the Facility resulting from a Force Majeure event. The Term shall be extended day for day for each day performance is suspended due to a Force Majeure event.
- c. Notwithstanding anything herein to the contrary, the obligation to make any payment due under this Agreement shall not be excused by a Force Majeure event.
- d. If a Force Majeure event continues for a period of one hundred (180) days or more within a twelve (12) month period and prevents a material part of the performance by a Party hereunder, the Party not claiming the Force Majeure shall have the right to terminate this Agreement without fault or further liability to either Party (except for amounts accrued but unpaid).

19. Assignment and Financing.

- a. **Assignment.** This Agreement may not be assigned in whole or in part by either Party without the prior written consent of the other Party, which consent shall not be unreasonably withheld or delayed. Notwithstanding the foregoing, Seller may, without the prior written consent of Purchaser, (i) assign, mortgage, pledge or otherwise collaterally assign its interests in this Agreement to any Financing Party, (ii) directly or indirectly assign this Agreement to an affiliate of Seller, (iii) assign this Agreement to any entity through which Seller is obtaining financing or capital for the System and (iv) assign this Agreement to any person succeeding to all or substantially all of the assets of Seller (provided that Seller shall be released from liability hereunder as a result of any of the foregoing permitted assignments only upon assumption of Seller's obligations hereunder by the assignee). Purchaser's consent to any other assignment shall not be unreasonably withheld if Purchaser has been provided with reasonable proof that the proposed assignee (x) has comparable experience in operating and maintaining photovoltaic solar systems comparable to the System and providing services comparable to those contemplated by this Agreement and (y) has the financial capability to maintain the System and provide the services contemplated by this Agreement in the manner required by this Agreement. This Agreement shall be binding on and inure to the benefit of the successors and permitted assignees.
- b. **Financing.** The Parties acknowledge that Seller may obtain construction and long-term financing or other credit support from lenders or third parties ("**Financing Parties**") in connection with the installation, construction, ownership, operation and maintenance of the System. Both Parties agree in good faith to consider and to negotiate changes or additions to this Agreement that may be reasonably requested by the Financing Parties; provided, that such changes do not alter the fundamental economic terms of this Agreement. The Parties also agree that Seller may assign this Agreement to the Financing Parties as collateral, and in connection with any such assignment, Purchaser agrees to execute a consent to assignment in customary form and reasonably acceptable to the Financing Parties.

20. **Confidentiality and Publicity.**

- a. **Confidentiality.** If either Party provides confidential information, including business plans, strategies, financial information, proprietary, patented, licensed, copyrighted or trademarked information, and/or technical information regarding the design, operation and maintenance of the System or of Purchaser's business ("Confidential Information") to the other or, if in the course of performing under this Agreement or negotiating this Agreement a Party learns Confidential Information regarding the facilities or plans of the other, the receiving Party shall (a) protect the Confidential Information from disclosure to third parties with the same degree of care accorded its own confidential and proprietary information, and (b) refrain from using such Confidential Information, except in the negotiation and performance of this Agreement. Notwithstanding the above, a Party may provide such Confidential Information to its, officers, directors, members, managers, employees, agents, contractors and consultants (collectively, "Representatives"), and affiliates, lenders, and potential assignees of this Agreement (provided and on condition that such potential assignees be bound by a written agreement or legal obligation restricting use and disclosure of Confidential Information), in each case whose access is reasonably necessary to the negotiation and performance of this Agreement. Each such recipient of Confidential Information shall be informed by the Party disclosing Confidential Information of its confidential nature and shall be directed to treat such information confidentially and shall agree to abide by these provisions. In any event, each Party shall be liable (with respect to the other Party) for any breach of this provision by any entity to whom that Party improperly discloses Confidential Information. The terms of this Agreement (but not its execution or existence) shall be considered Confidential Information for purposes of this Section 20(a), except as set forth in Section 20(b). All Confidential Information shall remain the property of the disclosing Party and shall be returned to the disclosing Party or destroyed after the receiving Party's need for it has expired or upon the request of the disclosing Party. Each Party agrees that the disclosing Party would be irreparably injured by a breach of this Section 20(a) by the receiving Party or its Representatives or other person to whom the receiving Party discloses Confidential Information of the disclosing Party and that the disclosing Party may be entitled to equitable relief, including injunctive relief and specific performance, in the event of a breach of the provision of this Section 20(a). To the fullest extent permitted by applicable law, such remedies shall not be deemed to be the exclusive remedies for a breach of this Section 20(a), but shall be in addition to all other remedies available at law or in equity.
- b. **Permitted Disclosures.** Notwithstanding any other provision in this Agreement, neither Party shall be required to hold confidential any information that (i) becomes publicly available other than through the receiving Party, (ii) is required to be disclosed to a Governmental Authority under applicable law or pursuant to a validly issued subpoena (but a receiving Party subject to any such requirement shall promptly notify the disclosing Party of such requirement to the extent permitted by applicable law), (iii) is independently developed by the receiving Party or (iv) becomes available to the receiving Party without restriction from a third party under no obligation of confidentiality. If disclosure of information is required by a Governmental Authority, the disclosing Party shall, to the extent permitted by applicable law, notify the other Party of such required disclosure promptly upon becoming aware of such required disclosure and shall cooperate with the other Party in efforts to limit the disclosure to the maximum extent permitted by law.

21. **Goodwill and Publicity.** Neither Party shall use any name, trade name, service mark or trademark of the other Party in any promotional or advertising material without the prior written consent of such other Party. The Parties shall coordinate and cooperate with each other when making public announcements related to the execution and existence of this Agreement, and each Party shall have the right to promptly review, comment upon and approve any publicity materials, press releases or other public statements by the other Party that refer to, or that describe any aspect of, this Agreement. Neither Party shall make any press release regarding or public announcement or the specific terms of this Agreement (except for filings or other statements or releases as may be required by applicable law) without the specific prior written consent of the other Party. Without limiting the generality of the foregoing, all public statements must accurately reflect the rights and obligations of the Parties under this Agreement, including the ownership of Environmental Attributes and Environmental Incentives and any related reporting rights.

22. **General Provisions**

- a. **Choice of Law.** California law shall govern this Agreement without giving effect to conflict of laws principles.
- b. **Arbitration and Attorneys' Fees.** Any dispute arising from or relating to this Agreement shall be arbitrated in Orange County, California. The arbitration shall be administered by JAMS in accordance with its Comprehensive Arbitration Rules and Procedures, and judgment on any award may be entered in any court of competent jurisdiction. If the Parties agree, a mediator may be consulted prior to arbitration. The prevailing party in any dispute arising out of this Agreement shall be entitled to reasonable attorneys' fees and costs.

- c. **Notices.** All notices under this Agreement shall be in writing and shall be by personal delivery, facsimile transmission, electronic mail, overnight courier, or regular, certified, or registered mail, return receipt requested, and deemed received upon personal delivery, acknowledgment of receipt of electronic transmission, the promised delivery date after deposit with overnight courier, or five (5) days after deposit in the mail. Notices shall be sent to the person identified in this Agreement at the addresses set forth in this Agreement or such other address as either party may specify in writing. Each party shall deem a document faxed to it as an original document.
- d. **Survival.** Provisions of this Agreement that should reasonably be considered to survive termination of this Agreement shall survive. For the avoidance of doubt, surviving provisions shall include, without limitation, Section 4 (Representations and Warranties), Section 7(h) (No Warranty), Section 15(b) (Insurance), Section 17 (Indemnification), Section 20 (Confidentiality and Publicity), Section 22(a) (Choice of Law), Section 22 (b) (Arbitration and Attorneys' Fees), Section 22(c) (Notices), Section 22 (g) (Comparative Negligence), Section 22(h) (Non-Dedication of Facilities), Section 22(i) (Service Contract), Section 22(k) (No Partnership) Section 22(l) (Full Agreement, Modification, Invalidity, Counterparts, Captions) and Section 22(n) (No Third Party Beneficiaries).
- e. **Further Assurances.** Each of the Parties hereto agree to provide such information, execute and deliver any instruments and documents and to take such other actions as may be necessary or reasonably requested by the other Party which are not inconsistent with the provisions of this Agreement and which do not involve the assumptions of obligations other than those provided for in this Agreement, to give full effect to this Agreement and to carry out the intent of this Agreement.
- f. **Right of Waiver.** Each Party, in its sole discretion, shall have the right to waive, defer or reduce any of the requirements to which the other Party is subject under this Agreement at any time; provided, however that neither Party shall be deemed to have waived, deferred or reduced any such requirements unless such action is in writing and signed by the waiving Party. No waiver will be implied by any usage of trade, course of dealing or course of performance. A Party's exercise of any rights hereunder shall apply only to such requirements and on such occasions as such Party may specify and shall in no event relieve the other Party of any requirements or other obligations not so specified. No failure of either Party to enforce any term of this Agreement will be deemed to be a waiver. No exercise of any right or remedy under this Agreement by Purchaser or Seller shall constitute a waiver of any other right or remedy contained or provided by law. Any delay or failure of a Party to exercise, or any partial exercise of, its rights and remedies under this Agreement shall not operate to limit or otherwise affect such rights or remedies. Any waiver of performance under this Agreement shall be limited to the specific performance waived and shall not, unless otherwise expressly stated in writing, constitute a continuous waiver or a waiver of future performance.
- g. **Comparative Negligence.** It is the intent of the Parties that where negligence is determined to have been joint, contributory or concurrent, each Party shall bear the proportionate cost of any Liability.
- h. **Non-Dedication of Facilities.** Nothing herein shall be construed as the dedication by either Party of its facilities or equipment to the public or any part thereof. Neither Party shall knowingly take any action that would subject the other Party, or other Party's facilities or equipment, to the jurisdiction of any Governmental Authority as a public utility or similar entity. Neither Party shall assert in any proceeding before a court or regulatory body that the other Party is a public utility by virtue of such other Party's performance under this agreement. If Seller is reasonably likely to become subject to regulation as a public utility, then the Parties shall use all reasonable efforts to restructure their relationship under this Agreement in a manner that preserves their relative economic interests while ensuring that Seller does not become subject to any such regulation. If the Parties are unable to agree upon such restructuring, Seller shall have the right to terminate this Agreement without further liability, and Seller shall remove the System in accordance with Section 11 of this Agreement.
- i. **Estoppel.** Either Party hereto, without charge, at any time and from time to time, within five (5) business days after receipt of a written request by the other party hereto, shall deliver a written instrument, duly executed, certifying to such requesting party, or any other person specified by such requesting Party: (i) that this Agreement is unmodified and in full force and effect, or if there has been any modification, that the same is in full force and effect as so modified, and identifying any such modification; (ii) whether or not to the knowledge of any such party there are then existing any offsets or defenses in favor of such party against enforcement of any of the terms, covenants and conditions of this Agreement and, if so, specifying the same and also whether or not to the knowledge of such party the other party has observed and performed all of the terms, covenants and conditions on its part to be observed and performed, and if not, specifying the same; and (iii) such other information as may be reasonably requested by the requesting Party. Any written instrument given hereunder may be relied upon by the recipient of such instrument, except to the extent the recipient has actual knowledge of facts contained in the certificate.

- j. **Service Contract.** The Parties intend this Agreement to be a "service contract" within the meaning of Section 7701(e)(3) of the Internal Revenue Code of 1986. Purchaser will not take the position on any tax return or in any other filings suggesting that it is anything other than a purchase of electricity from the System
- k. **No Partnership.** No provision of this Agreement shall be construed or represented as creating a partnership, trust, joint venture, fiduciary or any similar relationship between the Parties. No Party is authorized to act on behalf of the other Party, and neither shall be considered the agent of the other.
- l. **Full Agreement, Modification, Invalidity, Counterparts, Captions.** This Agreement, together with any Exhibits, completely and exclusively states the agreement of the parties regarding its subject matter and supersedes all prior proposals, agreements, or other communications between the parties, oral or written, regarding its subject matter. This Agreement may be modified only by a writing signed by both Parties. If any provision of this Agreement is found unenforceable or invalid, such unenforceability or invalidity shall not render this Agreement unenforceable or invalid as a whole. In such event, such provision shall be changed and interpreted so as to best accomplish the objectives of such unenforceable or invalid provision within the limits of applicable law. This Agreement may be executed in any number of separate counterparts and each counterpart shall be considered an original and together shall comprise the same Agreement. The captions or headings in this Agreement are strictly for convenience and shall not be considered in interpreting this Agreement.
- m. **Forward Contract.** The transaction contemplated under this Agreement constitutes a "forward contract" within the meaning of the United States Bankruptcy Code, and the Parties further acknowledge and agree that each Party is a "forward contract merchant" within the meaning of the United States Bankruptcy Code.
- n. **No Third Party Beneficiaries.** Except as otherwise expressly provided herein, this Agreement and all rights hereunder are intended for the sole benefit of the Parties hereto and shall not imply or create any rights on the part of, or obligations to, any other Person.

End of Document



CITY OF COSTA MESA

77 FAIR DRIVE, P.O. BOX 1200, COSTA MESA, CA 92628-1200

FINANCE DEPARTMENT
PURCHASING

CITY OF COSTA MESA

REQUEST FOR PROPOSALS

SOLAR POWER PURCHASE AGREEMENT PROJECT FOR NCC

PROPOSAL NO. 1129

NOTICE IS HEREBY GIVEN that sealed proposals shall be received by the City of Costa Mesa to wit: The City of Costa Mesa, City Clerk's Office, P. O. Box 1200, Costa Mesa, California 92628-1200, on or before the hour of 3:00pm on **April 20, 2009**. It shall be the responsibility of the Respondent to deliver his/her proposal to the City Clerk by the proper announced time. Delivery Location: City of Costa Mesa, City Clerk's Office, 77 Fair Drive, Room 101, Costa Mesa, California 92626.

Proposals shall be returned to the attention of the City Clerk, within said time limit, in a sealed envelope identified on the outside with the 's *Business Name, Proposal Item Number, Solar Power Purchase Agreement Project for NCC, and the Opening Date*. There will be no public opening of proposals.

A pre-proposal meeting and job-walk will take place on Friday, April 03, 2009 at 3:00 p.m. Respondents are to meet in the lobby of the City of Costa Mesa Neighborhood Community Center, 1845 Park Avenue, Costa Mesa, California 92626.

Attendance at the pre-proposal meeting and job-walk is mandatory.

Respondents may obtain additional sets of the Request for Proposal in the Finance Department. Please contact Donald L. Stocker, C.P.M., CPIM, Purchasing Buyer at (714) 754-5227, 77 Fair Drive, Costa Mesa, California 92626.

Dated: March 23, 2009

TABLE OF CONTENTS

Introduction	4
Location of Work	4
General Description of Work	4
Minimum Qualifications	4
Power Purchase Agreement	4
Scope of Work and Standards	5
System Pricing Proposal	5
Instructions to Respondents	6
Definition of Key Words	6
Pre-Bid Conference	6
Inquiries	6
Amendment of Request for Proposals	6
Familiarization with Scope of Work	6
Preparation of Proposal	6
Proposal/Submittal Format	7
Public Records	7
Confidential Information	7
Certification	7
Where to Submit Proposals	7
Late Proposals	7
Offer and Acceptance Period	7
Proposal Opening and Results	7
Withdrawal of Proposal	7
Cancellation of Solicitation	8
Right of Discussion	8
Award Selection Process	8
Award of Contract	8
Negotiations	8
Notice of Intent to Award	8
Execution of Contract	8
Compliance with Laws	8
Disqualification of Respondent(s)	8
Experience and Competency	8
Indemnification	9
Insurance	9
Worker's Compensation Insurance	9
Liability Insurance Coverage	10
Endorsements – 3 Provisions	10

Independent Contractor	10
Interpretation of Contract Documents	10
City Business License.....	10
General Terms and Conditions	11
Assignment of Rights.....	11
Attorney Fees	11
Authority of The City	11
Cancellation of the Contract	11
Changes in Work	11
Compliance/Deviation to Scope of Work/Specifications	11
Contract Incorporation	11
Force Majeure	12
Adherence to Local Laws	12
Prevailing Wage	12
Laws Governing Contract	12
Proof of Insurance	12
Severability	12
Changes to Specifications	12
Standard Terms & Conditions.....	12
Standard Conditions	13
Respondent's Information Form	14
Proposal Submission Requirements	15
RFP Cover Sheet	15
Table of Contents	15
Executive Summary.....	15
Qualifications	15
Experience and Background.....	15
Project Implementation Schedule	16
System Design Information.....	16
Warranty & Service Information.....	16
System Monitoring	16
Evaluation Process & Criteria – Step 1	17
Respondent Experience and References	17
Technical Approach & Product/Technical Design.....	17
Evaluation Process & Criteria – Step 2	17
PPA Pricing Structure	17
Evaluation Panel – Proposal Scoring Sheet – Exhibit Document	18
Statement of Acknowledgments	20
ATTACHMENT “A” - Sample Document	
Professional Services Agreement - Sample	21
ATTACHMENT “B” - Exhibit Document	
Council Policy – Drug-free Workplace	29

INTRODUCTION

The City of Costa Mesa is seeking a firm, or a team of firms, to provide turnkey design, engineering, materials, delivery, installation, and commissioning of a cost effective and energy efficient solar photovoltaic electric generating system, that will maximize the solar and renewable energy resource potential of the rooftop site at the city's Neighborhood Community Center (NCC). The City intends to enter into a Power Purchase Agreement (PPA) for terms up to twenty years with the solar PV developer at this site. The developer may also be asked to assist the City with identifying implementing solar PV projects at other sites depending upon the success of the initial program.

LOCATION OF WORK

The work to be performed hereunder is located at the City of Costa Mesa - Neighborhood Community Center, 1845 Park Avenue, in the City of Costa Mesa, California.

GENERAL DESCRIPTION OF WORK

The developer shall design/engineer and install a solar PV system to maximize the solar energy resources at the Neighborhood Community Center facility, taking into consideration the facility's electrical demand and load patterns, proposed installation site(s), available solar resources, applicable zoning ordinances, installation costs, and other relevant factors.

MINIMUM QUALIFICATIONS

To qualify as a contractor for award of this agreement, the prime contractor or joint venture must either individually, or collectively, demonstrate extensive training, relevant expertise and a thorough knowledge of the professional services, functions, activities and related responsibilities to successfully perform their role in the solar PV installation. The Respondent shall provide sufficient information in the submitted proposal to enable the Evaluation Panel to evaluate his/her ability to successfully complete the scope of work.

POWER PURCHASE AGREEMENT

The PPA arrangement is to apply to the entire system listed in this document. The Respondent is to provide a 15-year term PPA with option to extend to a 20-year term, with available buyout and renewal options at 10, 15, and 20 year points during the term, and at end of term. The City is to pay no up-front fees. The City is to retain all Environmental Attributes including Renewable Energy Credits (REC) and carbon credits. At the end of the PPA or renewal term, and should The City choose not to purchase the system, the Respondent will pay to remove all PV system(s) and to return all sites to pre-existing conditions at their expense with no cost to The City.

The Respondent is to include a copy of their approved PPA contract and site lease with their proposal submittal.

Include renewal options and proposed purchase pricing.

SCOPE OF WORK AND STANDARDS

The Respondent shall design, provide, install, own and maintain the solar PV system. The City of Costa Mesa will purchase the electricity produced by the PV system through a Power Purchase Agreement. The scope of the PV system is all inclusive and will include planning, engineering, labor, materials, delivery, installation, and commissioning, as well as all warranties and maintenance as described below. The Respondent shall include in its proposal, all elements necessary for a turn-key project, including but not limited to; rebate applications, grid connection agreement, all permits and approvals from governing agencies, and all labor, taxes, services and equipment.

Solar panels are to be located on the roof of the NCC only, and may use the roof of the Downtown Recreation Center (DRC) in order to augment the solar array.

Net metering will be located at the NCC only.

All solar panels, tracks, and anchoring equipment shall not exceed 5 lbs/sf.

All equipment shall be UL listed.

All installations shall be compliant with the California Building Code (2007) and the California Electrical Code (2007).

Solar arrays layout shall comply with the attached "Guideline for Fire Safety Elements of Solar Photovoltaic Systems" dated July 17, 2008.

Solar production shall include web-based monitoring and shall monitor the electrical use of the facility in real time. Both the solar production and the NCC electrical use shall be electronically displayed for public viewing via a monitor.

Guaranteed minimum output from the system shall be 85% of the expected performance output from the system.

SYSTEM PRICING PROPOSAL

Respondent's pricing proposal must be submitted in a separate sealed envelope.

The proposal shall include savings or be cost neutral to the City. i.e. no additional cost to the City.

Respondent's pricing proposal shall include the following:

1. Approximate PV system size in (kw) AC and DC.
2. Total system construction and installation cost (\$).
3. Base year contract price (\$/kWh).
4. Annual escalation factor (%).
5. Expected annual output (kWh/yr).
6. Minimum annual guaranteed output (kWh/yr).
Must be minimum of 85% of expected annual output.
7. Value of Renewable Energy Credits (REC) (\$/kWh).
8. Annual degradation factor (%).

INSTRUCTIONS TO RESPONDENTS

1. DEFINITION OF KEY WORDS USED IN THE SOLICITATION:

For purposes of this solicitation and subsequent contract, the following definitions shall apply:

City: The City of Costa Mesa, California.

Contract: The legal agreement executed between the City and the Contractor/Consultant. The Contract shall include this RFP document incorporated herein by reference, all terms, conditions, specifications, scope of work, Amendments and the Contractor's bid as accepted by the City.

Contractor/Consultant: The individual, partnership, or corporation who, as a result of the competitive solicitation process, is awarded a contract by the City.

Contract Representative: The City employee or employees who have specifically been designated to act as a contact person or persons to the Contractor; and are responsible for monitoring and overseeing the Contractor's performance under this Contract.

May: Indicates something that is not mandatory but permissible.

Respondent: The individual, partnership, or corporation who submits a proposal in response to a solicitation.

Shall, Will, Must: Indicates a mandatory requirement. Failure to meet these mandatory requirements, if they constitute a substantive requirement, may at the City's sole discretion, result in the rejection of the bid as non-responsive.

Should: Indicates something that is recommended but not mandatory. If the Respondent fails to provide recommended information, the City may, at its sole option, ask the Respondent to provide the information or evaluate the proposal without the information.

2. **PRE-PROPOSAL CONFERENCE:** If scheduled, the date and time of a Pre-Proposal conference is indicated on the cover page of this document. Attendance at this conference is not mandatory. Written minutes and/or notes will not be available, therefore attendance is encouraged. If a Respondent is unable to attend the Pre-Proposal Conference, questions may be submitted in writing. Respondents are encouraged to submit written questions, via electronic mail or facsimile, at least five days prior to the Request for Proposal due date to the Purchasing Supervisor. The purpose of this conference will be to clarify the contents of this Request for Proposal in order to prevent any misunderstanding. Any doubt as to the requirements of this Request for Proposal or any apparent omission or discrepancy should be presented to the City at this meeting. The City will then determine the appropriate action necessary, if any, and may issue a written amendment to the Request for Proposal. Oral statements or instructions will not constitute an amendment to this Request for Proposal.

3. **INQUIRIES:** Any question related to the Request for Proposal shall be directed to the Purchasing Supervisor. Questions and comments regarding this solicitation must be submitted in writing, either by mail, facsimile or e-mail to the Purchasing Buyer, City of Costa Mesa, 77 Fair Drive, Costa Mesa, California, 92626, faxed to (714) 754-5040 or e-mailed to: dstocker@ci.costa-mesa.ca.us, no later than ten (10) days before the Submittal Deadline. The questioner's company name, address, phone and fax number, and contact person must be included with the questions or comments. Any correspondence related to a solicitation should refer to the appropriate Request for Proposal number, page and paragraph number. An envelope containing questions should be identified as such; otherwise it may not be opened until after the official proposal due date and time. Oral interpretations or clarifications will be without legal effect. Only questions answered by a formal written amendment to the Request for Proposal will be binding. Answers will be sent to all known proposal holders.

4. **AMENDMENT OF REQUEST FOR PROPOSAL:** The Respondent shall acknowledge receipt of a Request for Proposal Amendment by signing and returning the document by the specified due date and time.

5. **FAMILIARIZATION WITH SCOPE OF WORK:** Prior to submitting a proposal, each Respondent shall familiarize themselves with the Scope of Work, laws, regulations and other factors affecting contract performance. The Respondent shall be responsible for fully understanding the requirements of the subsequent Contract and otherwise satisfy themselves as to the expense and difficulties accompanying the fulfillment of contract requirements. The submission of a proposal will constitute a representation of compliance by the Respondent. There will be no subsequent financial adjustment, other than that provided by the subsequent Contract, for lack of such familiarization.

6. PREPARATION OF PROPOSAL:

A. All proposals shall incorporate any forms provided in this Request for Proposal package. It is permissible to copy these forms as required. Facsimiles or electronic mail proposals shall not be considered.

B. All proposal forms and any solicitation amendments must be signed and returned with the proposal. The forms submitted shall be signed by a person authorized to submit an offer. An authorized signature on the proposal forms, Proposal Amendment(s), or cover letter accompanying the proposal documents shall constitute an irrevocable offer to provide services specified herein. Respondent shall submit any additional requested documentation, signifying intent to be bound by the terms of the agreement.

- C. The authorized person signing the proposal shall initial erasure, interlineations or other modifications on the proposal.
 - D. Periods of time, stated as a number of days, shall be in calendar days.
 - E. It is the responsibility of all Respondents to examine the entire Request for Proposal package and seek clarification of any requirement that may not be clear and to check all responses for accuracy before submitting a proposal. Negligence in preparing a proposal confers no right of withdrawal after due date and time.
 - F. The City shall not reimburse the cost of developing, presenting, submitting or providing any response to this solicitation.
 - G. Periods of time, stated as a number of days, shall be in calendar days.
 - H. Respondent must list any subcontractors to be utilized in the performance of the services specified herein. For each subcontractor, details on respective qualifications must be included.
- 7. PROPOSAL/SUBMITTAL FORMAT:** Each submittal package will consist of the Original and 5 copies (6 total) of each proposal. The original copy of the proposal should be clearly labeled "Original". The material should be presented in sequence and format as indicated in the Proposal Submission Requirements section on pages 15 & 16 of this document. The Proposal and the Pricing sections of the submittal must be submitted in two separate sealed envelopes. Failure to do so could result in the submittal being rejected as non-compliant with the requirements of the Request for Proposals. Failure to include any requested information may have a negative impact on the evaluation of the Respondent's proposal.
- 8. PUBLIC RECORD:** All proposals submitted in response to this Request for Proposal shall become the property of the City and shall become a matter of public record available for review subsequent to the award notification.
- 9. CONFIDENTIAL INFORMATION:** The City of Costa Mesa is obligated to abide by all public information laws. If a Respondent believes that any portion of a proposal, offer, specification, protest or correspondence contains information that should be withheld; a statement advising the Purchasing Buyer of this fact should accompany the submission and the information shall be so identified wherever it appears. The City shall review all requests for confidentiality and may provide a written determination to designate specified documents confidential or the request may be denied. Price is not confidential and will not be withheld. If the confidential request is denied, such information shall be disclosed as public information.
- 10. CERTIFICATION:** By signature on the Statement of Acknowledgments page, solicitation Amendment(s), or cover letter accompanying the submittal documents, Respondent certifies that:
- A. The submission of the offer did not involve collusion or other anti-competitive practices.
 - B. The Respondent shall not discriminate against any employee or applicant for employment in violation of Federal or State law.
 - C. The Respondent has not given, offered to give, nor intends to give at any time hereafter, any economic opportunity, future employment, gift, loan, gratuity, special discount, trip, favor, meal or service to a public servant in connection with the submitted offer.
 - D. The Respondent hereby certifies that the individual signing the submittal is an authorized agent for the Respondent and has the authority to legally bind the Respondent to the Contract.
 - E. The Respondent acknowledges that he/she has read and understands the City of Costa Mesa's Council Policy #100-5 for a "Drug-Free Workplace" (Attachment B) and hereby agrees to comply with required policy.
- 11. WHERE TO SUBMIT PROPOSALS:** In order to be considered, the Respondent must complete and submit their proposal to the City of Costa Mesa City Clerk's Office at the location indicated, prior to or at the exact date and time indicated on the Notice of Request for Proposal page. The Respondent's complete proposal (Proposal and Pricing sections in separate sealed envelopes) shall be submitted in a sealed envelope. The words "SEALED PROPOSAL" with the REQUEST FOR PROPOSAL TITLE, REQUEST FOR PROPOSAL NUMBER, PROPOSAL DUE DATE AND TIME and RESPONDENT'S NAME AND ADDRESS shall be written on the envelope.
- 12. LATE PROPOSALS:** Late proposals will be rejected.
- 13. OFFER AND ACCEPTANCE PERIOD:** In order to allow for an adequate evaluation, the City requires an offer in response to this solicitation to be valid and irrevocable for ninety (90) days after the proposal due date and time.
- 14. PROPOSAL OPENING AND RESULTS:** Please note that there will be no public opening of proposals. A list of the names of respondents who submitted proposals may be obtained within a reasonable time after the public opening.
- 15. WITHDRAWAL OF PROPOSAL:** At any time prior to the specified solicitation due date and time, a respondent may formally withdraw the proposal by a written letter, facsimile or electronic mail from the Respondent or a designated representative. Telephonic or oral withdrawals shall not be considered.

- 16. CANCELLATION OF SOLICITATION:** The City may cancel this solicitation at any time.
- 17. RIGHT of DISCUSSION:** The City reserves the right to conduct discussions with respondents who submit proposals determined to be reasonably susceptible of being selected for an award. Discussions may be for the purpose of clarification to assure full understanding of, and responsiveness to, the solicitation requirements.
- 18. AWARD SELECTION PROCESS:** Selection of qualified Respondents will be based on the following: quality and completeness of submitted proposal; understanding of project objectives; project approach; experience and expertise with public agencies and similar types of efforts; and references. Additional questions may be asked of Respondents and interviews may be conducted. Respondents will be notified of any additional required information or interviews after the written proposals have been evaluated. The recommended proposals will be submitted to the City Council for contract approval. The Respondent selected will enter into a contract with the City.
- 19. AWARD OF CONTRACT:** Notwithstanding any other provision of the Request for Proposal, the City reserves the right to:
- (1) waive any immaterial defect or informality; or to
 - (2) reject any or all proposals, or portions thereof; or to
 - (3) reissue the Request for Proposal.

A response to this Request for Proposal is an offer to contract with the City based upon the terms, conditions and scope of work contained in the City's Request for Proposal. Proposals do not become contracts unless and until they are executed by the City Council. A contract has its inception in the award, eliminating a formal signing of a separate contract. All of the terms and conditions of the contract are contained in the Request for Proposal, unless any of the terms and conditions are modified by a Request for Proposal amendment, a Contract Amendment, or by mutually agreed terms and conditions in the contract documents. An Evaluation Panel will be established by the City of Costa Mesa. The award will be made to the Respondent submitting the most advantageous proposal after consideration of all Evaluation Criteria set forth in The Evaluation Process & Criteria Section (page 17). The Evaluation Panel will evaluate all proposals received in accordance with the Evaluation Criteria. The City reserves the right to establish weight factors that will be applied to the criteria depending upon order of importance. The award will be made in the best interests of the City after all factors have been evaluated.

- 20. NEGOTIATIONS:** Exclusive or concurrent negotiations may be conducted with responsible respondent(s) for the purpose of altering or otherwise changing the conditions, terms and price of the proposed contract unless prohibited. Respondents shall be accorded fair and equal treatment in conducting negotiations and there shall be no disclosure of any information derived from proposals submitted by competing respondents.
- 21. NOTICE OF INTENT TO AWARD:** A Notification of Intent to Award will be sent to the Respondent selected.
- 22. EXECUTION OF CONTRACT:** A Professional Services Agreement will be created by the City Attorney's Office (See Sample Document Attachment A). The RFP, the Respondent's proposal, and the Professional Services Agreement will become incorporated as the complete contract. The Successful Respondent shall execute the contract, including but not limited to signing all necessary documents and submitting all required evidences of insurance, within ten (10) days after personal delivery of the notice or within fifteen (15) days after such notice has been deposited in the United States mail. One copy of the contract will be returned to the respondent after the City of Costa Mesa executes the contract. In case of failure by the Respondent to execute and return the contract and all required documents within the time allowed, the City of Costa Mesa may, at its option, consider that the Respondent to have abandoned the contract.
- 23. COMPLIANCE WITH LAWS:** All proposals shall comply with current federal, state, and other laws relative thereto.
- 24. DISQUALIFICATION OF RESPONDENT(S):** If there is reason to believe that collusion exists among the Respondents, the City may refuse to consider proposals from participants in such collusion. No person, firm, or corporation under the same or different name, shall make, file, or be interested in more than one proposal for the same work unless alternate proposals are called for. A person, firm, or corporation who has submitted a sub-proposal to a Respondent, or who has quoted prices on materials to a Respondent, is not thereby disqualified from submitting a sub-proposal or quoting prices to other Respondents. Reasonable ground for believing that any Respondent is interested in more than one Proposal for the same work will cause the rejection of all Proposals for the work in which a Contractor is interested. If there is reason to believe that collusion exists among the Contractors, the City of Costa Mesa may refuse to consider Proposals from participants in such collusion. Contractors shall submit as part of their Proposal documents the completed Non-Collusion Affidavit provided herein.

- 25. EXPERIENCE AND COMPETENCY.** The successful respondent shall be skilled and regularly engaged in the general class or type of work called for under the contract. The successful respondent shall also have no less than two (2) years experience in the magnitude and character of the work proposal within the County of Orange. Each

Respondent shall provide information about experience with the proposal. It is the intention of the City of Costa Mesa to award contracts to respondents who furnish satisfactory evidence that he/she has the requisite experience, ability, sufficient capital, and facilities to enable him to prosecute the work successfully and properly, and to complete it within the time specified in the contract. To determine the degree of responsibility to be credited to the Respondent, the City of Costa Mesa will weigh any evidence that the Respondent has performed satisfactorily other contracts of like nature, magnitude, and comparable difficulty and comparable rates of progress. In selecting the most responsive and responsible Respondent, consideration will be given not only to the financial standing but also to the general competency of the Respondent for the performance of the work specified in the contract documents.

26. INDEMNIFICATION: Respondent shall protect and indemnify the City, the City Council, and all of its or their officers, agents and servants against any claim or liability arising from or based on bidder's violation of any existing or future State, Federal, and local laws, ordinances, regulations, orders or decrees pertaining to bidder's submittal.

Respondent agrees to protect, defend, indemnify, save and hold harmless the City and its elected and appointed boards, officers, agents, and employees from any and all claims, liabilities, expenses, or damages of any nature, including attorney fees, for injury to or death of any person (respondent's employees included), and for injury to any property, including consequential damages of any nature resulting there from, arising out of or in any way connected with the performance of this contract, except that the indemnity obligation of respondent shall be reduced by an amount proportional to the active negligence of City, if any.

Respondent shall comply with all of the provisions of the Workers' Compensation insurance laws and Safety in Employment laws of the State of California, including the applicable provisions of Divisions 4 and 56 of the California Labor Code and all amendments thereto and regulations promulgated pursuant thereto, and all similar State, Federal, or local laws applicable; and contractor shall indemnify and hold harmless City from and against all claims, liabilities, expenses, damages, suits, actions, proceedings and judgments, of every nature and description, including attorney fees, that may be presented, brought or recovered against the City for or on account of any liability under or failure to comply with any of said laws which may be incurred by reason of any work performed under this contract by respondent or any subcontractor or others performing on behalf of respondent.

The City does not, and shall not waive any rights against respondent, which it may have by reason of the above hold harmless agreements, because of the acceptance by the City or the deposit with the City by contractor of any or all of the required insurance policies.

The hold harmless agreements by respondent shall apply to all liabilities, expenses, claims, and damages of every kind (including but not limited to attorney fees) incurred or alleged to have been incurred, by reason of the operations of respondent or any subcontractor or others performing on behalf of respondent, whether or not such insurance policies are applicable.

Respondent shall require any and all subcontractors to afford the same degree of indemnification to the City of Costa Mesa and its elected and appointed boards, officers, agents, and employees that is required of respondent and shall incorporate identical indemnity provisions in all contracts between respondent and his/her subcontractors.

In the event that respondent and City are sued by a third party for damages caused or allegedly caused by negligent or other wrongful conduct of respondent, or by a dangerous condition of City's property created by respondent or existing while the property was under the control of respondent, said respondent shall not be relieved of its indemnity obligation to City by any settlement with any such third party unless that settlement includes a full release and dismissal of all claims by the third party against the City.

INSURANCE: Respondent shall not commence work under this contract until he/she has obtained all insurance required under this section and the insurance has been approved by City as to form, amount, and carrier, nor shall respondent allow any subcontractor to commence any work until all similar insurance required of the subcontractor has been obtained and approved.

Neither the failure of respondent to supply specified insurance policies and coverage, nor the failure of City to approve same shall alter or invalidate the provisions of this contract.

WORKERS' COMPENSATION INSURANCE: Respondent shall obtain and maintain during the life of this contract workers' compensation insurance and, if any work is sublet, respondent shall require all subcontractors to obtain workers' compensation insurance.

All workers' compensation insurance policies shall provide that the insurance may not be canceled without thirty (30) days advance written notice of such cancellation to City.

Respondent is aware of the provision of Section 3700 of the Labor Code, which requires every employer to be insured against liability for Workman's Compensation or undertake self-insurance in accordance with the provisions of that Code, and will comply, with such provisions before commencing the performance of the work of this contract.

LIABILITY INSURANCE COVERAGE: Respondent shall obtain and maintain during the life of this contract the following insurance coverage:

Commercial General Liability, including coverage for premises-operations, products/completed operations hazard, blanket contractual, broad form property damage, and independent contractors, personal injury. Automobile liability, including owned, hired, and non-owned vehicles.

The above insurance coverage shall have limits of not less than one million dollars (\$1,000,000.00) combined single limit, per occurrence and aggregate.

Endorsements to the policies providing the above insurance shall be obtained by respondent, adding the following three provisions:

Additional insureds: *(For Commercial General Liability only)*

"The City of Costa Mesa and its elected and appointed boards, officers, agents, and employees are additional insured with respect to the subject project and agreement."

Notice:

"Said policy shall not terminate, nor shall it be canceled nor the coverage reduced, until thirty (30) days after written notice is given to City."

Other Insurance:

"Any other insurance maintained by the City of Costa Mesa shall be excess and not contributing with the insurance provided by this policy."

All insurance carriers utilized by the respondent or any subcontractor under this contract shall be approved by the California Department of Insurance to transact business in the State of California. The types of services provided under this contract may further require respondent's insurance carrier(s) to be admitted insurers in the State of California.

- 26. INDEPENDENT CONTRACTOR:** Contractor covenants that it presently has no interest, and shall not acquire any interest, direct or indirect, financial or otherwise, which would conflict in any manner or degree with the performance of the services hereunder. Contractor further covenants that, in the performance of this contract, no subcontractor or person having such an interest shall be employed. Contractor certifies that to the best of his knowledge, no one who has or will have any financial interest under this contract is an officer or employee of City of Costa Mesa. It is expressly agreed by Contractor that in the performance of the services required under this contract, Contractor, and any of its subcontractors or employees, shall at times be considered independent Contractors and not agents of City of Costa Mesa.
- 27. INTERPRETATION OF CONTRACT DOCUMENTS:** If any person is in doubt as to the true meaning of any part of the specifications or other contract documents, or finds discrepancies or omissions in the specifications, he may submit to the City of Costa Mesa a written request for an interpretation or correction. Requests for interpretations shall be made in writing and delivered to the City of Costa Mesa Purchasing Division Attn: Donald Stocker, C.P.M., CPIM, Purchasing Buyer, by mail at PO Box 1200, Costa Mesa, California, 92626, by e-mail dstocker@ci.costa-mesa.ca.us or by facsimile to (714) 754-5040 at least ten (10) days before the Submittal Deadline. The requesting party is responsible for prompt delivery of any requests. When the City of Costa Mesa considers interpretations necessary, interpretations will be in the form of an addendum to the contract documents, and when issued, will be sent as promptly as is practical to all parties recorded by the City of Costa Mesa as having received contract documents. All such addenda shall become a part of the contract. Oral and other interpretations or clarifications shall be without legal or contractual effect. It is the responsibility of each Contractor to ensure the City of Costa Mesa has their correct business name and address on file. Any prospective Contractor who obtained a set of contract documents from anyone other than the City of Costa Mesa is responsible for advising the City of Costa Mesa that they have a set of contract documents and wish to receive subsequent Addenda.
- 28.** The successful Respondent *may* be required to have a valid City of Costa Mesa business license prior to providing service for the City of Costa Mesa.

(SEE STANDARD AND WORK ORDER CONDITIONS ON PAGE 13) - ALSO PRINTED ON THE BACK OF THE PURCHASE ORDER)

GENERAL TERMS AND CONDITIONS

ASSIGNMENT OF RIGHTS OR OBLIGATIONS: Except as noted hereunder, successful respondent may not assign, transfer or sell any rights or obligations resulting from this solicitation without first obtaining the specific written consent of the City.

ATTORNEY FEES: In the event a suit or action is instituted in connection with any controversy arising out of this contract, the prevailing party shall be entitled to receive, in addition to its costs, such sum as the court may adjudge reasonable as to attorney's fees and costs.

AUTHORITY OF THE CITY: Subject to the power and authority of the City as provided by law in this contract, the City shall in all cases determine the quantity, quality, and acceptability of the work, provided under this contract. The City shall decide the questions that may arise relative to the fulfillment of the contract or the obligations of the contractor hereunder.

CANCELLATION OF THE CONTRACT: Without cause, the City may cancel this contract at any time with thirty (30) days written notice to the supplier/contractor. With cause, the City may cancel this contract at any time with ten (10) days written notice to the Contractor. Cancellation for cause shall be at the discretion of the City and shall be, but is not limited to, failure to supply the materials, equipment or service specified within the time allowed or within the terms, conditions or provisions of this contract. The successful Contractor may not cancel this contract without prior written consent of the Chief of Police.

CHANGES IN WORK: The City may, at any time work is in progress, by written order and without notice to the sureties, make alterations in the terms of work as shown in the specifications, require the performance of extra work, decrease the quantity of work, or make such other changes as the City may find necessary or desirable. The Respondent shall not claim forfeiture of contract by reasons of such changes by the City. Changes in work and the amount of compensation to be paid to the Contractor for any extra work as so ordered shall be determined in accordance with the unit prices of contractor's proposal.

COMPLIANCE OR DEVIATION TO SCOPE OF WORK/SPECIFICATIONS: Respondent hereby agrees that the material, equipment or service offered will meet all the requirements of the specifications in this solicitation unless deviations from them are clearly indicated in the Respondent's response. Contractor may submit an attachment entitled "Exceptions to Specifications", which must be signed by Respondent's authorized representative. An explanation must be made for each item in which an exception is taken, giving in detail the extent of the exception and the reason for which it is taken. Proposals failing to comply with this requirement will be considered non-responsive.

CONTRACT INCORPORATION: This contract embodies the entire contract between the City and the Contractor. The parties shall not be bound by or be liable for any statement, representation, promise, inducement or understanding of any kind or nature not set forth herein. No changes, amendments, or modifications of any of the terms or conditions of the contract shall be valid unless reduced to writing and signed by both parties. The complete contract shall include the entire contents of the RFP solicitation, all addenda, all of Contractor's successful submittal, supplemental agreements, change orders, and any and all written agreements which alter, amend or extend the contract. Contractor's signed Proposal and City's written acceptance shall constitute a binding contract.

FORCE MAJEURE: If execution of this contract shall be delayed or suspended and if such failure arises out of causes beyond the control of and without fault or negligence of the Contractor, the Contractor shall notify the City, in writing, within twenty-four (24) hours, after the delay. Such causes may include but are not limited to acts of God, war, acts of a public enemy, and acts of any governmental entity in its sovereign or contractual capacity, fires, floods, epidemics, strikes and unusually severe weather.

ADHERENCE TO ALL LOCAL, STATE, AND FEDERAL LAWS AND REQUIREMENTS: The Contractor shall adhere to all current applicable federal, state, and local laws, codes and ordinances, including, but not limited to, those promulgated by CAL-OSHA, FED-OSHA, EPA, and the California State Department of Health Services.

PREVAILING WAGE: In accordance with the provisions of Section 1773 of the California Labor Code, the general prevailing rates of per diem wages and holiday and overtime work in the locality in which the work is to be performed has been obtained from the Director of the Department of Industrial Relations. The contractor, and any subcontractor under him/her, shall pay not less than the specified prevailing rates of wages to all workmen employed in the execution of the contract. Contractor shall abide by the provisions of the California Labor Code, Section 1770 et seq.

LAWS GOVERNING CONTRACT: This contract shall be in accordance with the laws of the State of California. The parties stipulate that this contract was entered into in the County of Orange, in State of California. The parties further stipulate that the County of Orange, California, is the only appropriate forum for any litigation resulting from a breach hereof or any questions risen here from.

PROOF OF INSURANCE: The Successful Contractor must furnish the City with the Certificates of Insurance proving coverage of General Liability, Workers' Compensation and Automobile insurance. (See Indemnification and Insurance Requirement pages 9-10, and Terms & Conditions page 13 item #15). If you have any questions regarding the insurance requirements for the City of Costa Mesa, please contact Jen Sommers in the Risk Management Office at (714) 754-5228.

SEVERABILITY: If any provisions or portion of any provision, of this contract are held invalid, illegal or unenforceable, they shall be severed from the contract and the remaining provisions shall be valid and enforceable.

SPECIFICATIONS, CHANGES TO: The parties shall not be bound by or be liable for any statement, representation, promise, inducement or understanding of any kind or nature not set forth herein or by written amendment. No changes, amendments, or modifications of any of the terms or conditions of the specification shall be valid unless reduced to writing and signed by both parties.

STANDARD TERMS AND CONDITIONS: In addition to the terms and conditions of the RFP, the standard terms and conditions shall also apply to this contract. They are listed on the next page.

CONDITIONS. The following standard conditions are always applicable, and the following work order conditions are also applicable when this order provides for performance of any work.

STANDARD CONDITIONS

1. **Law:** This contract is governed by the laws of the State of California. The provisions of the Uniform Commercial Code shall apply except as otherwise set forth in this contract.
2. **Contract:** This order, when accepted by SELLER either in writing or by the shipment of any article or other commencement of performance hereunder, constitutes the entire contract between SELLER and the CITY, no exceptions, alternates, substitutes or revisions are valid or binding on the CITY unless authorized by the CITY in writing. The SELLER acknowledges that he has read and agrees to all terms and conditions of this contract/purchase order. The only terms and conditions that will be applicable to the interpretation of this contract are those issued by the City of Costa Mesa.
3. **Taxes:** Unless otherwise provided herein or by law, price quoted does not include California State sales or use tax. The City is exempt from Federal excise tax.
4. **Delivery:** Time of delivery is the essence of this contract. The CITY reserves the right to refuse any goods and to cancel all or any part of the goods not delivered by the due date and/or not conforming to applicable specifications, drawings, samples or descriptions. Acceptance of any part of the order shall not bind CITY to accept future shipments, nor deprive it the right to return goods already accepted, at SELLER'S expense. Over shipments and under shipments shall be only as agreed to by CITY.
5. **Risk of Loss:** Delivery shall not be deemed to be complete until goods have been actually received and accepted by CITY. Payment shall be made after satisfactory acceptance of shipments by the CITY.
6. **Warranty:** SELLER expressly warrants that the goods covered by this order are of merchantable quality, satisfactory and safe for consumer use, and are fit for the particular purpose as set forth in the CITY'S specification. Acceptance of this order shall constitute an agreement upon SELLER'S part to indemnify and hold harmless from liability, loss, damage and expense, including reasonable attorney fees, incurred or sustained by CITY, its officers, employees and agents, by reason of the failure of the goods to conform to such warranties, faulty work performance, negligent or unlawful acts, and noncompliance with any applicable local, State or Federal codes, ordinances, orders, or statutes, including the Occupational Safety and Health Act (OSHA) and the California Industrial Safety Act. Such remedies shall be in addition to any other remedies provided by law. Inspection by the City of Costa Mesa or its agents or employees and acceptance of the articles, materials and work covered by this contract shall not constitute release or waiver of the City of Costa Mesa's rights by reason of failure of Contractor to comply with any of the warranties contained herein. Warranties herein expressed or implied shall be construed as consistent with each other and as cumulative and, where in conflict, the specifications of the City of Costa Mesa shall be paramount.
7. **Infringement:** SELLER shall indemnify and defend CITY, at SELLER'S expense, against all claims, demands, suits, liability and expense on account of alleged infringement of any patent, copyright or trademark, resulting from or arising in connection with the manufacture, sale, normal use or other normal disposition of any article or material furnished hereunder.
8. **Assignment:** Neither this order nor any claim against CITY arising directly or indirectly out of or in connection with this order shall be assignable by SELLER or by operation or law, nor shall SELLER subcontract any obligations hereunder, without CITY'S prior written consent.
9. **Default:** If SELLER or any subcontractor breaches any provision hereof, or becomes insolvent, enters bankruptcy, receivership or other like proceeding (voluntarily or involuntarily) or makes assignment for the benefit or creditors, CITY shall have the right, in addition to any other rights it may have hereunder or by law, to terminate this order by giving SELLER written notice whereupon (a) CITY shall be relieved of all further obligation hereunder, except to pay the reasonable value of SELLER'S prior performance, but not more than the contracted price, and (b) CITY may procure the articles or services from other sources and may deduct from unpaid balance due the vendor or may collect against the bond or surety, or may invoice the vendor for excess cost so paid. The price paid by CITY shall be considered prevailing market price at the time such purchase is made.
10. **Labor Disputes:** Whenever any actual or potential labor dispute delays or threatens to delay the timely performance of this order, SELLER shall immediately give written notice thereof to CITY.
11. **Nondiscrimination:** In the performance of the terms of any contract resulting from this order, SELLER agrees that they will not engage nor permit such subcontractors, where applicable as he may employ, from engaging in discrimination in employment of persons because of the race, color, sex, national origin or ancestry, disability or religion of such person.
12. **Termination:** The CITY reserves the right to terminate this contract without penalty and without cause after 30 days' written notice unless otherwise specified.

WORK ORDER CONDITIONS

13. **Performance:** SELLER shall perform all work diligently, carefully, and in a good and workmanlike manner; shall furnish all labor, supervision, machinery, equipment, materials and supplies necessary therefore; shall obtain and maintain all building and other permits and licenses required by public authorities in connection with performance of the work; and, if permitted to subcontract, shall be fully responsible for all work performed by subcontractors. SELLER shall conduct all operations in SELLER'S own name and as independent contractor, and not in the name of, or as an agent for CITY.
14. **Indemnification:** The Contractor hereby agrees to defend at his own cost and to indemnify and hold harmless the City of Costa Mesa, its officers, agents and employees, from and against any and all liability, damages, costs, losses, claims and expenses, howsoever caused, resulting directly or indirectly from or connected with the performance of the contract (including but not limited to such liability, costs, damage, loss, claim, or expense arising from the death or injury to an agent or employee of the Contractor, subcontractor, or the City of Costa Mesa or loss of, damage to, or destruction of the property of Contractor, subcontractor, or of the City of Costa Mesa, or of any agent or employee of the Contractor, subcontractor, or of the City of Costa Mesa), except where such liability, damages, costs, losses, claims or expenses are caused solely by the negligent or wrongful acts of the City of Costa Mesa or any of its agents or employees other than negligent omission or commissions of the City of Costa Mesa, its agents or employees, in connection with the general supervision or direction of the work to be performed hereunder. The Contractor, in addition to the foregoing, specifically shall indemnify and save harmless the City of Costa Mesa, any and all of the City of Costa Mesa's officers, agents, and employees, from any liability by reason of California safe place statutes or similar provisions pertaining to the workplace or safety of materials or equipment supplied by the City of Costa Mesa or others at the direction of the City of Costa Mesa and used in the performance of the work hereunder.
15. **Insurance:** SELLER shall maintain in full force during the term of this contract the following insurances, in a form and with companies as approved by the CITY, with limits not less than those specified: (a) Worker's Compensation and Employer's Liability complying with any statutory requirements; (b) Commercial General Liability insurance including broad form property damage, products/completed operations and contractual liability coverage, with a \$1,000,000 combined single limit each occurrence; Endorsements to the Commercial General Liability insurance shall be obtained by contractor, adding the following three provisions; (1) Additional insureds: "The City of Costa Mesa and its elected and appointed boards, officers, agents, and employees are additional insureds with respect to the subject project and agreement." (2) Notice: "Said policy shall not terminate, nor shall it be cancelled nor the coverage reduced, until thirty (30) days after written notice is given to City." (3) Other insurance: "Any other insurance maintained by the City of Costa Mesa shall be excess and not contributing with the insurance provided by this policy." (c) Comprehensive Auto Liability (including the owned, nonowned and hired automobile hazards) with \$1,000,000 combined single limit each occurrence. If the CITY so desires, these limits may be increased or decreased.
16. **Bills and Liens:** SELLER shall pay promptly all indebtedness for labor, materials and equipment used in performance of the work. SELLER shall not permit any lien or charge to attach to the work or the premises, but if any does so attach, SELLER shall promptly procure its release and indemnify CITY against all damages and expense incident thereto.
17. **Bonds:** If the CITY so desires, SELLER shall provide payment and performance bonds as required.
18. **Changes:** SELLER shall make no change in the work or perform any additional work without the CITY'S specific written approval.

MISCELLANEOUS CONDITIONS

19. All plants and materials must be free of pests and disease. If any are found, the material will be rejected and refused. Vendor will pick up at no cost to the CITY.
20. Vendor is required to provide a completed MSDS (Material Safety Data Sheet) for hazardous substances as required by Labor Code Sections 6390; General Industrial Safety Order, Section 5194; and Title 8, California Admins. Code. MSDS sheet for each specified item shall be sent to place of shipment, and a copy sent to the Purchasing Division.

DEFINITION

Whenever used herein, "CITY" shall mean, City of Costa Mesa, a political subdivision of the State of California.

RESPONDENT'S INFORMATION FORM

If the proposal is by corporation, state the names of the officers who can sign an agreement on behalf of the corporation and whether more than one officer must sign. If the proposal is by a partnership or a joint venture, state the names and addresses of all general partners and joint venture parties. If the respondent is a sole proprietorship or another entity that does business under a fictitious name, the proposal shall be in the real name of the respondent with a designation following showing "DBA (the fictitious name)," provided however, that no fictitious name shall be used unless there is a current registration with the Orange County Recorder.

The undersigned, as respondent, declares that all documents regarding this proposal have been examined and accepted and that, if awarded, will enter into a contract with the City of Costa Mesa.

Firm Name: _____

Address: _____

Telephone: (____) _____
Area Code

Fax: (____) _____
Area Code

Length of time in business: _____

Federal Tax I.D. Number: _____ Incorporated: Yes _____ No _____

Authorized Signature: _____

Circle One: Owner Partner Officer Other

Print Signature Name: _____

Title: _____

Vendor Contact Person: _____

Telephone: (____) _____
Area Code

PROPOSAL SUBMISSION REQUIREMENTS

The Respondent selected through this RFP will be required to demonstrate extensive training, experience, and a thorough and practical knowledge of the professional services, functions, activities, and responsibilities relating to the construction of solar PV, as well as special building systems. In addition, the selected Respondent must demonstrate a proven track record of success on a wide and diverse range of solar PV projects.

All Respondents are requested to follow the format specified below. The contents of the submittal must be clear, concise, and complete. In order to aid in the expedient retrieval of information for review by the Evaluation Panel, each section of the RFP submittal should be tabbed in some fashion according to the numbering system shown below.

- 1. RFP Cover Sheet:** Include on the cover of the RFP the name, address, email address, fax number, and telephone number of the Respondent and the RFP submittal deadline.
- 2. Table of Contents:** Include a complete and clear listing of headings and corresponding page numbers.
- 3. Executive Summary:** Provide an executive summary that includes a brief overview of the principal elements of the proposal, demonstration of an understanding of the project objectives, and describing your approach to solar PV systems.

Please Include:

- Company organization chart
 - Describe your methods, procedures, and plans for carrying out the Scope of Work. This may include, but is not limited to, approach to determine recommended systems, sources of comparable projects.
 - Discussion of work assignments between the prime contractor and any subcontractors, if used.
 - Proposed list of all subcontractors (name & location) and the volume(s) of work they will undertake expressed as a percentage of the entire project.
- 4. Qualifications:** To qualify as a prime contractor for award of this agreement, the prime contractor or joint venture must either individually, or collectively, demonstrate the relevant expertise to successfully perform their role and responsibilities of the solar PV installation. The Respondent shall provide sufficient information in the proposal for the Evaluation Panel to evaluate his/her ability to successfully complete the scope of work and meet the following minimum qualifications. In this section, the Respondent must provide the following:
 - Maintenance of a valid business tax registration number
 - General, C-10, C-46 Contracting License in good standing
 - Proof of General Liability and Workers Compensation Insurance
 - States and countries in which your firm is licensed to conduct business
 - Provide a statement and information to address the following question:
Is your firm currently in the process of being sold or acquired within the next 12 months?
 - Company's current bond rating
 - 5. Experience and Background:** Provide a background summary of experience that demonstrates the qualifications, corporate strength and technical capability to provide the services specified, and to successfully accomplish the work. This section should also include:
 - a. A brief description and background summary for the prime contractors' firm and key staff.

- b. Indicate whether the Respondent Contractor or its officers or principals have been party to any lawsuit involving the performance of any equipment that it has installed, and if contractor has been required to pay liquidated damages for lateness or performance.
- c. List of similar projects firm has completed and that would be available for site visit by the Evaluation Panel – particularly any rooftop installations. List name of client, location, system size AC, type of system and client contact information so that if desired, a site visit can be scheduled.
- 6. Project Implementation Schedule:** As part of your submittal, please propose an implementation schedule, at a minimum including the milestones listed below. Include all principal tasks, approvals, and permits required. Assume a June 01, 2009 Notice To Proceed.
- Complete design schematics
 - Final design
 - Structural design with engineering stamp
 - Panel layout
 - Completed single line diagrams
 - Approval by the City of Costa Mesa Building Inspection Department
 - Required approvals and permits obtained
 - Interconnection approved by Southern California Edison
 - Delivery of PV modules
 - Delivery of inverter
 - Delivery of balance of system components
 - Delivery of support structures and other structural materials
 - Complete start up
 - Complete acceptance test
 - Conduct on-site training
 - Deliver required manuals and other documentation
- 7. System Design Information:**
- Provide system schematic design layout for the PV system. Include PV module type - model# - wattage, number of modules, year-one (1) kWh production, degradation percentage (%), inverter type - model, mounting system type, azimuth, tilt, system size AC and DC.
- 8. Training, System Warranty and Service Information:**
- Provide an overview of your firm's onsite training in PV system operations, safety and maintenance consistent with warranty and service contract provisions.
 - Provide a copy of your standard ten-year system warranty and service contract provisions.
- 9. System Monitoring**
- A monitoring and Data Acquisition System (DAC) must be included in the cost of installation.
 - Describe your monitoring system and its capabilities.
 - If available, provide an internet link with a guest login to allow for viewing of a currently live system installed by your company.

EVALUATION PROCESS & CRITERIA

The City of Costa Mesa assumes no obligation to choose any Respondent or to proceed in any way with the project. All costs associated with the response to this document are borne solely by the Respondent and all materials submitted become the property of The City.

The evaluation/selection process will be completed in two steps. All proposals received will first be evaluated based on relevant experience, capacity to perform and complete the project, and the thoroughness of the proposal documentation. The best proposals will be selected to advance to Step 2 after conducting proposal evaluations, site visits, and checking references. The pricing sections of only the selected proposals will then be opened. The winning proposal will then be selected based on the evaluation of both the proposal and the pricing structure offered. All Respondents will receive the results of this process.

CRITERIA

Step 1

Respondent Experience and References

- Demonstrated recent, relevant experience as Prime Contractor, with strong technical background in PV design and installation, including track record in developing, designing, and installation of fully engineered and documented turn-key grid-connected solar projects larger than 100 kWp including at least one PV rooftop project.
- Depth and breadth of experience
- Demonstrated capability on similar projects, including favorable outcomes on past relevant projects
- Minimum three (3) references for projects of similar type and scope
- Project team experience and qualifications
- Proof of sufficient supply, by submission of PV supply contracts or letter from manufacturer, to meet the minimum requirements to fulfill this RFP.
- Financial strength of company

Technical Approach and Product / Technology Design

- Overall PV System design, technical approach, size, and appearance
- Proof of safe, UL-listed, commercially proven product and system design(s)
- Commercially proven, user-friendly, remote (web-based) system monitoring

Step 2

PPA Pricing Structure

- PPA pricing structure, terms, savings and/or adherence to cost neutral requirement

EVALUATION PANEL – PROPOSAL SCORING SHEET

Proposal Submission Requirements Evaluation Criteria	Weighted Scoring	Page Limitation
Executive Summary (Section 3)	30	
<input type="checkbox"/> Company Organization Chart. <input type="checkbox"/> Indicate if company has a local presence (Orange County or Costa Mesa). <input type="checkbox"/> Methods, procedures and plans to carry out the Scope of Work <input type="checkbox"/> Approach to determine recommended systems & sources of comparable projects. <input type="checkbox"/> Discussion of work assignments between Prime Contractor and any Sub-Contractors. <input type="checkbox"/> Understanding of the project objectives.		
Qualifications – Minimum (Section 4)	50	
<input type="checkbox"/> Maintains valid Business Tax Registration Number. <input type="checkbox"/> General, C-10, C-46 Contractor's License in Good Standing <input type="checkbox"/> Proof of General Liability & Worker's Compensation Insurance <input type="checkbox"/> States and Countries in which company is licensed for business <input type="checkbox"/> Sold or acquired in next 12 months <input type="checkbox"/> Current Bond Rating		
Experience & Background (Section 5)	90	
<input type="checkbox"/> Background summary for Prime Contractor's key staff (attach resumes) <input type="checkbox"/> Technical Background in the Field of Expertise Including Prior Experience in Developing, Designing, and Installation of Large Solar Projects. Include references to allow contact and/or site visits if necessary. <input type="checkbox"/> Indicate where the Solar panels are manufactured. <input type="checkbox"/> Identify if local installers will be used. <input type="checkbox"/> Lawsuit & Litigation history (if any) for similar projects		
Project Implementation Schedule (Section 6)	50	
<input type="checkbox"/> Delivery of complete design schematics with final panel layout <input type="checkbox"/> Approval by City of Costa Mesa Building Department & permits obtained <input type="checkbox"/> Interconnection approval by Southern California Edison <input type="checkbox"/> Delivery of materials <input type="checkbox"/> Complete start-up and testing <input type="checkbox"/> Conduct on-site training and delivery of operation manuals		
System Design Information (Section 7)	50	
<input type="checkbox"/> Identify latest technology used. <input type="checkbox"/> Provided system schematic design layout for the PV system <input type="checkbox"/> Included system model and inverter identification data <input type="checkbox"/> Included kWh production and degradation percentage		
Training, System Warranty and Service Information (Section 8)	30	
<input type="checkbox"/> On-site Training Overview <input type="checkbox"/> Identify if training will be offered and provided to local workforce. <input type="checkbox"/> Copy of Warranty included: Identified provider, warranty length, service contract provisions, response time, type of warranty (phone, site, etc.) <input type="checkbox"/> Safety & Maintenance consistent with warranty & service contract provisions		
System Monitoring (Section 9)	50	
<input type="checkbox"/> Description of data acquisition monitoring system and capabilities <input type="checkbox"/> Internet link to currently live monitoring system with guest login for viewing <input type="checkbox"/> System monitoring include power generation from Solar panels and its environmental attributes (Carbon offset, trees equivalent, etc.) <input type="checkbox"/> System monitoring include current power consumption of the facility <input type="checkbox"/> System monitoring with graphics, appropriate for display in educating the public to the benefits of Solar		
Step 1 Total Score (350 points possible)		

Proposal Submission Requirements Evaluation Criteria	Weighted Scoring	Page Limitation
System Pricing Proposal (Section 9)	150	
<input type="checkbox"/> Illustrated savings or cost neutral status to City <input type="checkbox"/> Guarantee clause to above <input type="checkbox"/> Approximate system size in (kw) AC and DC <input type="checkbox"/> Total system construction and installation costs <input type="checkbox"/> Base year contact price and expected annual output <input type="checkbox"/> Annual minimum guaranteed output (<i>85% of expected annual output</i>) <input type="checkbox"/> Annual escalation and degradation factors (%) <input type="checkbox"/> Value of Renewable Energy Credits (REC)		
Step 2 Total Score (150 points possible)		
Proposal Evaluation - Total Score (0-500)		

THE REMAINDER OF THIS PAGE HAS BEEN LEFT BLANK INTENTIONALLY

STATEMENT OF ACKNOWLEDGMENTS

Respondent's Acknowledgement of Understanding of the Terms and Conditions.

Signature below verifies that Respondent has read, understands, and agrees to the conditions contained herein and on all of the attachments and agenda.

Statement of Respondent's Ability to Meet Insurance Requirements

Authorized signature below acknowledges that respondent has reviewed the attached City of Costa Mesa Insurance Requirements with their insurance carrier and is able to provide verification of coverage following the award of the contract.

Statement of Independent Price Determination

Authorized signature below certifies that this bid/proposal is made without prior understanding, arrangement, agreement, or connection with any corporation, firm or person submitting a bid/proposal for the same services, materials, supplies, or equipment, and is in all respects fair and without collusion or fraud. Authorized signature certifies that respondent has not entered into any arrangement or agreement with any City of Costa Mesa public officer. Authorized signature acknowledges understanding that collusive bidding is a violation of State and Federal law and can result in fines, prison sentences, and civil damage awards. Authorized signature acknowledges agreement to abide by all conditions of this bid/proposal and certifies that person signing is authorized to sign this bid/proposal for the respondent.

Statement of Acknowledgement of Drug-Free Workplace Policy

The respondent/contractor acknowledges that he/she has read and understands the City of Costa Mesa's Council Policy #100-5 in a "Drug-Free Workplace" included as Attachment B and hereby agrees to comply with said required policy.

Representations Made Under Penalty Of Perjury

The representations herein are made under penalty of perjury. We do hereby offer to provide the services/materials to the City of Costa Mesa at the prices stated herein and under the terms and conditions herein, attached, or incorporated by referenced.

Respondent Name (Person, Firm, Corp.)

Signature of Authorized Representative

Address

Printed Name of Authorized Representative

City, State, Zip Code

Title of Authorized Representative

Telephone Number

Facsimile Number

PROFESSIONAL SERVICES AGREEMENT

THIS AGREEMENT is made and entered into this _____ day of _____, 2008 ("Effective Date"), by and between the CITY OF COSTA MESA, a municipal corporation ("City"), and _____, a ("Consultant").

WITNESSETH:

- A. WHEREAS, City proposes to have Consultant perform the services described herein below; and
- B. WHEREAS, Consultant represents that it has that degree of specialized expertise contemplated within California Government Code, Section 37103, and holds all necessary licenses to practice and perform the services herein contemplated; and
- C. WHEREAS, City and Consultant desire to contract for specific services in connection with the project described below (the "Project") and desire to set forth their rights, duties and liabilities in connection with the services to be performed; and
- D. WHEREAS, no official or employee of City has a financial interest, within the provisions of California Government Code, Sections 1090-1092, in the subject matter of this Agreement.

NOW, THEREFORE, for and in consideration of the mutual covenants and conditions contained herein, the parties hereby agree as follows:

1.0. SERVICES PROVIDED BY CONSULTANT

1.1. Scope of Services. Consultant shall provide the professional services described in the City's Request for Proposal ("RFP") attached hereto as Exhibit "A" and incorporated herein by reference and Consultant's Response to City's RFP (the "Response"). A copy of said Response is attached hereto as Exhibit "B" and incorporated herein by this reference.

1.2. Professional Practices. All professional services to be provided by Consultant pursuant to this Agreement shall be provided by personnel experienced in their respective fields and in a manner consistent with the standards of care, diligence and skill ordinarily exercised by professional consultants in similar fields and circumstances in accordance with sound professional practices. Consultant also warrants that it is familiar with all laws that may affect its performance of this Agreement and shall advise City of any changes in any laws that may affect Consultant's performance of this Agreement.

1.3. Warranty. Consultant warrants that it shall perform the services required by this Agreement in compliance with all applicable Federal and California employment laws including, but not limited to, those laws related to minimum hours and wages; occupational health and safety; fair employment and employment practices; workers' compensation insurance and safety in employment; and all other Federal, State and local laws and ordinances applicable to the services required under this Agreement. Consultant shall indemnify and hold harmless City from and against all claims, demands, payments, suits, actions, proceedings, and judgments of every nature and description including attorneys' fees and costs, presented, brought, or recovered against City for, or on account of any liability under any of the above-mentioned laws, which may be incurred by reason of Consultant's performance under this Agreement.

1.4. Non-discrimination. In performing this Agreement, Consultant shall not engage in, nor permit its agents to engage in, discrimination in employment of persons because of their race, religion, color, national origin, ancestry, age, physical handicap, medical condition, marital status, sexual gender or sexual orientation, except as permitted pursuant to Section 12940 of the Government Code. Violation of this provision may result in the imposition of penalties referred to in Labor Code, Section 1735.

1.5 Non-Exclusive Agreement. Consultant acknowledges that City may enter into agreements with other consultants for services similar to the services that are subject to this Agreement or may have its own employees perform services similar to those services contemplated by this Agreement.

1.6. Delegation and Assignment. This is a personal service contract, and the duties set forth herein shall not be delegated or assigned to any person or entity without the prior written consent of City. Consultant may engage a subcontractor(s) as permitted by law and may employ other personnel to perform services contemplated by this Agreement at Consultant's sole cost and expense.

2.0. COMPENSATION AND BILLING

2.1. Compensation. Consultant shall be paid in accordance with the fee schedule set forth in Exhibit “_,” attached hereto and made a part of this Agreement (the “Fee Schedule”). Consultant's compensation shall in no case exceed _____ Dollars (\$00).

2.2. Additional Services. Consultant shall not receive compensation for any services provided outside the scope of services specified in the Response unless the City or the Project Manager for this Project, prior to Consultant performing the additional services, approves such additional services in writing. It is specifically understood that oral requests and/or approvals of such additional services or additional compensation shall be barred and are unenforceable.

2.3. Method of Billing. Consultant may submit invoices to City's Project Manager for approval on a progress basis, but no more often than monthly. Said invoice shall be based on the total of all the Consultant's services which have been completed to City's sole satisfaction. City shall pay Consultant's invoice within forty-five (45) days from the date City receives said invoice. Each invoice shall describe in detail, the services performed and the associated time for completion. Any additional services approved and performed pursuant to this Agreement shall be designated as “Additional Services” and shall identify the number of the authorized change order, where applicable, on all invoices.

2.4. Records and Audits. Records of Consultant's services relating to this Agreement shall be maintained in accordance with generally recognized accounting principles and shall be made available to City or its Project Manager for inspection and/or audit at mutually convenient times for a period of three (3) years from the Effective Date.

3.0. TIME OF PERFORMANCE

3.1. Commencement and Completion of Work. The professional services to be performed pursuant to this Agreement will commence upon notification/request by the City representative as described in the Scope of Work and Standards section on page 3 of this Agreement. Said services shall be performed in strict compliance with the Scope of Work and Standards as stated herein. The Project Schedule may be amended by mutual agreement of the parties. Failure to commence work in a timely manner and/or diligently pursue work to completion may be grounds for termination of this agreement.

3.2. Excusable Delays. Neither party shall be responsible for delays or lack of performance resulting from acts beyond the reasonable control of the party or parties. Such acts shall include, but not be limited to, acts of God, fire, strikes, material shortages, compliance with laws or regulations, riots, acts of war, or any other conditions beyond the reasonable control of a party.

4.0. TERM AND TERMINATION

4.1. Term. This Agreement shall commence on the Effective Date and continue for a period of two (2) years, ending on February 28, 2011 and can be renewed on an annual basis for three additional one year periods, unless previously terminated as provided herein or as otherwise agreed to in writing by the parties.

4.2. Notice of Termination. The City reserves and has the right and privilege of canceling, suspending or abandoning the execution of all or any part of the work contemplated by this Agreement, with or without cause, at any time, by providing written notice to Consultant. The termination of this Agreement shall be deemed effective upon receipt of the notice of termination. In the event of such termination, Consultant shall immediately stop rendering services under this Agreement unless directed otherwise by the City.

4.3. Compensation. In the event of termination, City shall pay Consultant for reasonable costs incurred and professional services satisfactorily performed up to and including the date of City's written notice of termination. Compensation for work in progress shall be prorated as to the percentage of work completed as of the effective date of termination in accordance with the fees set forth herein. In ascertaining the professional services actually rendered hereunder up to the effective date of termination of this Agreement, consideration shall be given to both completed work and work in progress, to complete and incomplete drawings, and to other documents pertaining to the services contemplated herein whether delivered to the City or in the possession of the Consultant.

4.4 Documents. In the event of termination of this Agreement, all documents prepared by Consultant in its performance of this Agreement including, but not limited to, finished or unfinished design, development and construction documents, data studies, drawings, maps and reports, shall be delivered to the City within ten (10) days of delivery of termination notice to Consultant, at no cost to City. Any use of uncompleted documents without specific written authorization from Consultant shall be at City's sole risk and without liability or legal expense to Consultant.

5.0. INSURANCE

5.1. Minimum Scope and Limits of Insurance. Consultant shall obtain and maintain during the life of this Agreement all of the following insurance coverage:

- a) Comprehensive general liability, including premises-operations, products/completed operations, broad form property damage, blanket contractual liability, independent contractors, personal injury with a policy limit of not less than One Million Dollars (\$1,000,000.00), combined single limits, per occurrence and aggregate.
- b) Automobile liability for owned vehicles, hired, and non-owned vehicles, with a policy limit of not less than One Million Dollars (\$1,000,000.00), combined single limits, per occurrence and aggregate.
- c) Workers' compensation insurance as required by the State of California.
- d) Professional errors and omissions ("E&O") liability insurance with policy limits of not less than One Million Dollars (\$1,000,000.00) combined single limits, per occurrence and aggregate. Consultant shall obtain and maintain, said E&O liability insurance during the life of this Agreement and for three years after completion of the work hereunder.

5.2. Endorsements. The comprehensive general liability insurance policy shall contain or be endorsed to contain the following provisions:

- a) Additional insured: "The City of Costa Mesa and its elected and appointed boards, officers, agents, and employees are additional insured with respect to this subject project and contract with City."
- b) Notice: "Said policy shall not terminate, nor shall it be cancelled, nor the coverage reduced, until thirty (30) days after written notice is given to City."
- c) Other insurance: "Any other insurance maintained by the City of Costa Mesa shall be excess and not contributing with the insurance provided by this policy."

5.3. Certificates of Insurance: Consultant shall provide to City certificates of insurance showing the insurance coverage and required endorsements described above, in a form and content approved by City, prior to performing any services under this Agreement.

5.4. Non-limiting: Nothing in this Section shall be construed as limiting in any way, the indemnification provision contained in this Agreement, or the extent to which Consultant may be held responsible for payments of damages to persons or property.

6.0. GENERAL PROVISIONS

6.1. Entire Agreement: This Agreement constitutes the entire Agreement between the parties with respect to any matter referenced herein and supersedes any and all other prior writings and oral negotiations. This Agreement may be modified only in writing, and signed by the parties in interest at the time of such modification. The terms of this Agreement shall prevail over any inconsistent provision in any other contract document appurtenant hereto, including exhibits to this Agreement.

6.2. Representatives. The City Manager or his designee shall be the representative of City for purposes of this Agreement and may issue all consents, approvals, directives and agreements on behalf of the City, called for by this Agreement, except as otherwise expressly provided in this Agreement. Consultant shall designate a representative for purposes of this Agreement who shall be authorized to issue all consents, approvals, directives and agreements on behalf of Consultant called for by this Agreement, except as otherwise expressly provided in this Agreement.

6.3. Project Managers. City shall designate a Project Manager to work directly with Consultant in the performance of this Agreement. Consultant shall designate a Project Manager who shall represent it and be its agent in all consultations with City during the term of this Agreement. Consultant or its Project Manager shall attend and assist in all coordination meetings called by City.

6.4. Notices. Any notices, documents, correspondence or other communications concerning this Agreement or the work hereunder may be provided by personal delivery, facsimile or mail and shall be addressed as set forth below. Such communication shall be deemed served or delivered: a) at the time of delivery if such communication is sent by personal delivery; b) at the time of transmission if such communication is sent by facsimile; and c) 48 hours after deposit in the U.S. Mail as reflected by the official U.S. postmark if such communication is sent through regular United States mail.

IF TO CONSULTANT:

IF TO CITY:

Tel:
Fax:
Attn:

City of Costa Mesa
77 Fair Drive
Costa Mesa, CA 92626
Tel: 714-754-5277
Fax: 714-754-4856
Attn: Khanh Nguyen

6.5. Drug-free Workplace Policy. Consultant shall provide a drug-free workplace by complying with all provisions set forth in City’s Council Policy 100-5, attached hereto as Exhibit “A” and incorporated herein by reference. Consultant’s failure to conform to the requirements set forth in Council Policy 100-5 shall constitute a material breach of this Agreement and shall be cause for immediate termination of this Agreement by City.

6.6. Attorneys’ Fees. In the event that litigation is brought by any party in connection with this Agreement, the prevailing party shall be entitled to recover from the opposing party all costs and expenses, including reasonable attorneys’ fees, incurred by the prevailing party in the exercise of any of its rights or remedies hereunder or the enforcement of any of the terms, conditions, or provisions hereof.

6.7. Governing Law. This Agreement shall be governed by and construed under the laws of the State of California without giving effect to that body of laws pertaining to conflict of laws. In the event of any legal action to enforce or interpret this Agreement, the parties hereto agree that the sole and exclusive venue shall be a court of competent jurisdiction located in Orange County, California.

6.8. Assignment. Consultant shall not voluntarily or by operation of law assign, transfer, sublet or encumber all or any part of Consultant's interest in this Agreement without City's prior written consent. Any attempted assignment, transfer, subletting or encumbrance shall be void and shall constitute a breach of this Agreement and cause for termination of this Agreement. Regardless of City's consent, no subletting or assignment shall release Consultant of Consultant's obligation to perform all other obligations to be performed by Consultant hereunder for the term of this Agreement.

6.9. Indemnification and Hold Harmless. Consultant shall protect, defend, indemnify and hold harmless City and its elected and appointed officials, officers, and employees from any and all claims, liabilities, expenses, including attorney fees, damage to property or injuries to or death of any person or persons or damages of any nature including, but not by way of limitation, all civil claims or workers’ compensation claims arising out of or in any way connected with the intentional or negligent acts, error or omissions of Consultant, its employees, agents or subcontractors in the performance of this Agreement.

6.10. Independent Contractor. Consultant is and shall be acting at all times as an independent contractor and not as an employee of City. Consultant shall secure, at his expense, and be responsible for any and all payment of Income Tax, Social Security, State Disability Insurance Compensation, Unemployment Compensation, and other payroll deductions for Consultant and its officers, agents, and employees, and all business licenses, if any are required, in connection with the services to be performed hereunder.

6.11. Ownership of Documents. All findings, reports, documents, information and data including, but not limited to, computer tapes or discs, files and tapes furnished or prepared by Consultant or any of its subcontractors in the course of performance of this Agreement, shall be and remain the sole property of City. Consultant agrees that any such documents or information shall not be made available to any individual or organization without the prior consent of City. Any use of such

documents for other projects not contemplated by this Agreement, and any use of incomplete documents, shall be at the sole risk of City and without liability or legal exposure to Consultant. City shall indemnify and hold harmless Consultant from all claims, damages, losses, and expenses, including attorneys' fees, arising out of or resulting from City's use of such documents for other projects not contemplated by this Agreement or use of incomplete documents furnished by Consultant. Consultant shall deliver to City any findings, reports, documents, information, data, in any form, including but not limited to, computer tapes, discs, files audio tapes or any other Project related items as requested by City or its authorized representative, at no additional cost to the City.

6.12. Public Records Act Disclosure. Consultant has been advised and is aware that all reports, documents, information and data including, but not limited to, computer tapes, discs or files furnished or prepared by Consultant, or any of its subcontractors, and provided to City may be subject to public disclosure as required by the California Public Records Act (California Government Code Section 6250 et. seq.). Exceptions to public disclosure may be those documents or information that qualifies as trade secrets, as that term is defined in the California Government Code Section 6254.7, and of which Consultant informs City of such trade secret. The City will endeavor to maintain as confidential all information obtained by it that is designated as a trade secret. The City shall not, in any way, be liable or responsible for the disclosure of any trade secret including, without limitation, those records so marked if disclosure is deemed to be required by law or by order of the Court.

6.13. Responsibility for Errors. Consultant shall be responsible for its work and results under this Agreement. Consultant, when requested, shall furnish clarification and/or explanation as may be required by the City's representative, regarding any services rendered under this Agreement at no additional cost to City. In the event that an error or omission attributable to Consultant occurs, then Consultant shall, at no cost to City, provide all necessary design drawings, estimates and other Consultant professional services necessary to rectify and correct the matter to the sole satisfaction of City and to participate in any meeting required with regard to the correction.

6.14. Prohibited Employment. Consultant will not employ any regular employee of City while this Agreement is in effect.

6.15. Order of Precedence. In the event of an inconsistency in this Agreement and any of the attached Exhibits, the terms set forth in this Agreement shall prevail. If, and to the extent this Agreement incorporates by reference any provision of the RFP or the Response, such provision shall be deemed a part of this Agreement. Nevertheless, if there is any conflict among the terms and conditions of this Agreement and those of any such provision or provisions so incorporated by reference, this Agreement shall govern over both the Response and the RFP and the Response shall govern over the RFP.

6.16. Costs. Each party shall bear its own costs and fees incurred in the preparation and negotiation of this Agreement and in the performance of its obligations hereunder except as expressly provided herein.

6.17. No Third Party Beneficiary Rights. This Agreement is entered into for the sole benefit of City and Consultant and no other parties are intended to be direct or incidental beneficiaries of this Agreement and no third party shall have any right in, under or to this Agreement.

6.18. Headings. Paragraphs and subparagraph headings contained in this Agreement are included solely for convenience and are not intended to modify, explain or to be a full or accurate description of the content thereof and shall not in any way affect the meaning or interpretation of this Agreement.

6.19. Construction. The parties have participated jointly in the negotiation and drafting of this Agreement. In the event an ambiguity or question of intent or interpretation arises with respect to this Agreement, this Agreement shall be construed as if drafted jointly by the parties and in accordance with its fair meaning. There shall be no presumption or burden of proof favoring or disfavoring any party by virtue of the authorship of any of the provisions of this Agreement.

6.20. Amendments. Only a writing executed by the parties hereto or their respective successors and assigns may amend this Agreement.

6.21. Waiver. The delay or failure of either party at any time to require performance or compliance by the other of any of its obligations or agreements shall in no way be deemed a waiver of those rights to require such performance or compliance. 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. The waiver of any right or remedy in respect to any occurrence or event shall not be deemed a waiver of any right or remedy in respect to any other occurrence or event, nor shall any waiver constitute a continuing waiver.

6.22. Prevailing Wage. Consultant shall comply in all respects with Title 40 U.S.C. Section 276a, also known as "The Davis-Bacon Act," where Federal government funds are involved and Consultant shall also comply in all respects with California Labor Code, Sections 1770 et seq., including the keeping of all records required by the provisions of Labor Code Section 1776.

Contractor who is engaged in the construction, prosecution, completion or repair of any public building or public work, or building or work financed in whole or in part by loans or grants from the Federal government, shall furnish each week to City a statement with respect to the wages of each of its employees during the preceding weekly payroll period.

6.23. Severability. If any provision of this Agreement is determined by a court of competent jurisdiction to be unenforceable in any circumstance, such determination shall not affect the validity or enforceability of the remaining terms and provisions hereof or of the offending provision in any other circumstance. Notwithstanding the foregoing, if the value of this Agreement, based upon the substantial benefit of the bargain for any party is materially impaired, which determination as made by the presiding court or arbitrator of competent jurisdiction shall be binding, and then both parties agree to substitute such provision(s) through good faith negotiations.

6.24. Counterparts. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original. All counterparts shall be construed together and shall constitute one agreement.

6.25. Corporate Authority. The persons executing this Agreement on behalf of the parties hereto warrant that they are duly authorized to execute this Agreement on behalf of said parties and that by doing so; the parties hereto are formally bound to the provisions of this Agreement.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by and through their respective authorized officers, as of the date first above written.

CITY OF COSTA MESA,
A municipal corporation

Mayor of the City of Costa Mesa

Date

CONSULTANT

Signature

Date

Name and Title

Social Security or Taxpayer ID Number

ATTEST:

Deputy City Clerk and ex-officio Clerk
of the City of Costa Mesa

64

Council Policy – Drug-Free Workplace

CITY OF COSTA MESA, CALIFORNIA

COUNCIL POLICY

SUBJECT	POLICY NUMBER	EFFECTIVE DATE	PAGE
DRUG-FREE WORKPLACE	100-5	8/08/89	1 OF 3

BACKGROUND

Under the Federal Drug-Free Workplace Act of 1988, passed as part of omnibus drug legislation enacted November 18, 1988, contractors and grantees of Federal funds must certify that they will provide drug-free workplaces. At the present time, the City of Costa Mesa, as a sub-grantee of Federal funds under a variety of programs, is required to abide by this Act. The City Council has expressed its support of the national effort to eradicate drug abuse through the creation of a Substance Abuse Committee, institution of a City-wide D.A.R.E. program in all local schools and other activities in support of a drug-free community. This Policy is intended to extend that effort to contractors and grantees of the City of Costa Mesa in the elimination of dangerous drugs in the workplace.

PURPOSE

It is the purpose of this Policy to:

1. Clearly state the City of Costa Mesa's commitment to a drug-free society.
2. Set forth guidelines to ensure that public, private, and non-profit organizations receiving funds from the City of Costa Mesa share the commitment to a drug-free workplace.

POLICY

The City Manager, under direction by the City Council, shall take the necessary steps to see that the following provisions are included in all contracts and agreements entered into by the City of Costa Mesa involving the disbursement of funds.

1. Contractor or sub-grantee hereby certifies that it will provide a drug-free workplace by:
 - A. Publishing a statement notifying employees that the unlawful manufacturer, distribution, dispensing, possessing, or use of a controlled substance is prohibited in Contractor's and/or subgrantee's workplace, specifically the job site or location included in this contract, and specifying the actions that will taken against the employees for violation of such prohibition;
 - B. Establishing a Drug-Free Awareness Program to inform employees about:
 1. The dangers of drug abuse in the workplace;

CITY OF COSTA MESA, CALIFORNIA

COUNCIL POLICY

SUBJECT	POLICY NUMBER	EFFECTIVE DATE	PAGE
DRUG-FREE WORKPLACE	100-5	8/08/89	2 OF 3

- 2. Contractor's and/or sub-grantee's policy of maintaining a drug-free workplace;
 - 3. Any available drug counseling, rehabilitation and employee assistance programs; and
 - 4. The penalties that may be imposed upon employees for drug abuse violations occurring in the workplace.
- C. Making it a requirement that each employee to be engaged in the performance of the contract be given a copy of the statement required by Subparagraph A.
- D. Notifying the employee in the statement required by Subparagraph 1.A that, as a condition of employment under the contract, the employee will:
- 1. Abide by the terms of the statement; and
 - 2. Notify the employer of any criminal drug statute conviction for a violation occurring in the workplace no later than five (5) days after such violation.
- E. Notifying the City of Costa Mesa within ten (10) days after receiving notice under Subparagraph 1.D.2 from an employee or otherwise receiving the actual notice of such conviction.
- F. Taking one of the following actions within thirty (30) days of receiving notice under Subparagraph 1.D.2 with respect to an employee who is so convicted:
- 1. Taking appropriate personnel action against such an employee, up to and including termination; or
 - 2. Requiring such employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health agency, law enforcement, or other appropriate agency.
- G. Making a good faith effort to maintain a drug-free workplace through implementation of Subparagraph 1.A through 1.F, inclusive.
2. Contractor and/or sub-grantee shall be deemed to be in violation of this Policy if the City of Costa Mesa determines that:
- A. Contractor and/or sub-grantee has made a false certification under Paragraph 1 above.

CITY OF COSTA MESA, CALIFORNIA
COUNCIL POLICY

SUBJECT	POLICY NUMBER	EFFECTIVE DATE	PAGE
DRUG-FREE WORKPLACE	100-5	8/08/89	3 OF 3

- B. Contractor and/or sub-grantee has violated the certification by failing to carry out the requirements of Subparagraphs 1.A through 1.G above.
 - C. Such number of employees of Contractor and/or sub-grantee having been convicted of violations of criminal drug statutes for violations occurring in the workplace as to indicate that the Contractor and/or sub-grantee has failed to make a good faith effort to provide a drug-free workplace.
3. Should any Contractor and/or sub-grantee be deemed to be in violation of this Policy pursuant to the provisions of 2.A, B and C, a suspension, termination or debarment proceeding subject to applicable Federal, State, or local laws shall be conducted. Upon issuance of any final decision under this section requiring debarment of a Contractor and/or sub-grantee, the Contractor and/or sub-grantee shall be ineligible for award of any contract, agreement or grant from the City of Costa Mesa for a period specified in the decision, not to exceed five (5) years. Upon Issuance of any final decision recommending against debarment of the Contractor and/or sub-grantee, the Contractor and/or sub-grantee shall be eligible for compensation as provided by law.



CITY OF COSTA MESA

P.O. BOX 1200 • 77 FAIR DRIVE • CALIFORNIA 92628-1200

DEVELOPMENT SERVICES DEPARTMENT

**FOR ATTACHMENTS NOT INCLUDED IN THIS
REPORT, PLEASE CONTACT THE CITY CLERK'S
OFFICE AT (714) 754-5121**