



CITY COUNCIL AGENDA REPORT

MEETING DATE: FEBRUARY 15, 2011

ITEM NUMBER:

SUBJECT: APPROVAL OF AGREEMENT NO. C-1-2394 WITH THE ORANGE COUNTY TRANSPORTATION AUTHORITY (OCTA) FOR THE FAIRVIEW PARK WETLANDS AND RIPARIAN HABITAT PROJECT

DATE: FEBRUARY 3, 2011

FROM: PUBLIC SERVICES DEPARTMENT

PRESENTATION BY: PETER NAGHAVI, DIRECTOR, DEPARTMENT OF PUBLIC SERVICES

FOR FURTHER INFORMATION CONTACT: ERNESTO MUÑOZ, CITY ENGINEER, (714) 754-5335

RECOMMENDATION:

1. Approve Agreement No. C-1-2394 (Attachment 1) with the Orange County Transportation Authority (OCTA) for the use of Measure M (M2) Environmental Mitigation Program (EMP) Grant funding in the amount of \$2,000,000 for the Fairview Park Wetlands and Riparian Habitat Project.
2. Authorize the Mayor and City Clerk to execute the agreement.
3. Approve Budget Adjustment No. 11-012 (Attachment 2) to recognize the grant and appropriate funds for the Fairview Park Wetlands and Riparian Habitat Project.

BACKGROUND:

On November 7, 2006 voters approved M2 to fund transportation facility and service improvement programs for a period of thirty years commencing on April 1, 2011. M2 provides for the allocation of five percent (5%) of net freeway program revenues for mitigation of freeway projects. In Fiscal Year 2009/10 the first allocation of EMP funding for countywide restoration projects was \$5.5 million.

On September 27, 2010 the OCTA Board of Directors approved providing \$2,000,000 of Fiscal Year 2009/10 EMP funds for the City's Fairview Park Wetlands and Riparian Habitat Project. Funding will be utilized for Phase II of the project which includes the construction of a water delivery system from the Greenville-Banning Channel to the uppermost pond, the grading of wetland ponds, planting of 23 acres of coastal sage scrub, native grassland, oak and alder woodlands, wetland pond plantings, and the installation of an irrigation system. Phase I of the project was completed in September 2009 and included the grading of wetland ponds and streams, planting 17 acres of riparian habitat, and the installation of an irrigation system.

ANALYSIS:

The design of the Fairview Park Wetlands and Riparian Habitat Project, Phase II has been completed and is ready to be advertised for construction. If the attached agreement is approved by the City Council, the project will be advertised for construction immediately following the execution of the agreement. Construction would begin in the spring of 2011 and be completed by the spring of 2012. The City will be responsible for reporting the success of the project to the California Department of Fish and Game and the U.S. Fish and Wildlife Service during construction and through the plant establishment period for a total of eleven (11) years until 2022.

The M2 Grant pays for the maintenance of the project during the first year and for the entire monitoring and reporting period. The City will maintain the site in perpetuity after the first year of maintenance has been completed.

ALTERNATIVES CONSIDERED:

The City Council may opt not to approve the attached agreement and forfeit the M2 Grant. This action would delay the construction of the proposed Fairview Park Wetlands and Riparian Habitat Project, Phase II improvements indefinitely until a new funding source is secured by staff.

FISCAL REVIEW:

The Budget Adjustment No. 11-012 increases revenue and appropriates \$2,000,000 from the M2 Grant to the Capital Improvement Project budget for the Fairview Park Wetlands and Riparian Habitat Project.

Staff does not anticipate a City funded matching requirement to implement this phase of the project. The \$2,000,000 M2 Grant will be combined with the \$350,000 donation from the MiOcean Foundation for a total estimated project cost of \$2,350,000.

LEGAL REVIEW:

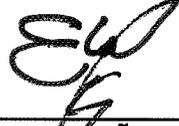
The proposed agreement has been approved as to form by the City Attorney.

CONCLUSION:

It is recommended that the Council approve Agreement No. C-1-2394 with the Orange County Transportation Authority (OCTA) for the use of Measure M (M2) Environmental Mitigation Program grant funding in the amount of \$2,000,000 for the Fairview Park Wetlands and Riparian Habitat Project, authorize the Mayor and City Clerk to execute the agreement, and approve the attached Budget Adjustment No. 11-012.



PETER NAGHAVI, Director
Department of Public Services



ERNESTO MUÑOZ
City Engineer



COLLEEN O'DONOGHUE
Assistant Finance Director

- Attachments: 1. Agreement No. C-1-2394
2. Budget Adjustment No. 11-012

- C: City Manager
Assistant City Manager
City Attorney
City Clerk
Parks Project Manager
Contract Administrator

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AGREEMENT NO. C-1-2394**BETWEEN****ORANGE COUNTY TRANSPORTATION AUTHORITY****AND****CITY OF COSTA MESA**

THIS AGREEMENT is effective as of this 18th day of February 2011, by and between the Orange County Transportation Authority, 550 South Main Street, P.O. Box 14184, Orange, CA 92863-1584, a public corporation of the state of California (hereinafter referred to as "OCTA"), and City of Costa Mesa, 77 Fair Drive, PO Box 1200, Costa Mesa, CA 92628, (hereinafter referred to as "CITY").

WITNESSETH:

WHEREAS, Voters approved the Measure M (M2) on November 7, 2006 whereby Ordinance No. 3 outlines the M2 Transportation Ordinance and Investment Plan to fund transportation facility and service improvement programs for a period of thirty years commencing on April 1, 2011. M2 provides for the allocation of at least 5 percent of net freeway program revenues (or approximately \$243.5 million in 2005 dollars) for mitigation of freeway projects. The intent of the program is to provide for comprehensive, rather than piecemeal, mitigation of the impacts of freeway projects and to do so in a way that results in high-value environmental benefits in exchange for streamlined project approvals and greater certainty in the delivery of the freeway program as a whole. The M2 Environmental Mitigation Program (EMP) will provide approximately \$27.5 million for acquisition and restoration projects for the first tranche of funding, available beginning in Fiscal Year 2009/10. With a current allocation goal of 80 percent of funds for acquisition and 20 percent for restoration over the life of the freeway mitigation program, the first tranche of funding will yield approximately \$5.5 million towards restoration projects; and

WHEREAS, OCTA will fund the Board of Directors (Board) approved restoration projects to support permitting of freeway projects by the United States Fish and Wildlife Service and the California

1 Department of Fish and Game (Wildlife Agencies) for habitat and species impacts pursuant to a Habitat
2 Conservation Plan/Natural Community Conservation Plan (HCP/NCCP) currently under development;
3 and

4 **WHEREAS**, The restoration activities on the Fairview Park property (hereinafter referred to as
5 "PROJECT") of the CITY shall be implemented, maintained and monitored in accordance with the
6 Board approved EMP Restoration Funding Guidelines, reviewed and approved by OCTA and the
7 Wildlife Agencies and in accordance with the HCP/NCCP once it is completed and approved; and

8 **WHEREAS**, CITY is the PROJECT sponsor responsible for implementing, maintaining and
9 monitoring restoration activities; and

10 **WHEREAS**, CITY has an existing conservation easement covering 20 acres of the first phase of
11 restoration on the PROJECT site and will amend or implement a new conservation easement that is
12 mutually acceptable to OCTA, Wildlife Agencies and CITY, and which maintains the restoration intent of
13 the project in perpetuity for the 23 acres covered by this agreement ; and

14 **WHEREAS**, CITY wishes to perform these services; and

15 **WHEREAS**, said restoration activities cannot be performed by the regular employees of OCTA;
16 and

17 **WHEREAS**, OCTA has determined that CITY's Restoration Plan (Exhibit A) has met the
18 requirements of and is eligible for funding under the EMP Restoration Funding Guidelines; and

19 **WHEREAS**, OCTA and CITY agree that EMP funding is subject to CITY fulfilling EMP
20 Restoration Funding Guidelines requirements; and

21 **WHEREAS**, OCTA can update the EMP Restoration Funding Guidelines at least biennially
22 whereby the most recent update is incorporated herein by reference; and

23 **WHEREAS**, this Agreement defines the specific terms and conditions and funding
24 responsibilities between OCTA and CITY for the EMP.

25 **NOW, THEREFORE**, it is mutually understood and agreed by OCTA and CITY as follows:

26 **ARTICLE 1. COMPLETE AGREEMENT**

A. This Agreement, including all exhibits and documents incorporated herein and made

1 applicable by reference, constitutes the complete and exclusive statement of the terms and conditions
2 of the agreement between OCTA and CITY and it supersedes all prior representations, understandings
3 and communications. The invalidity in whole or in part of any term or condition of this Agreement shall
4 not affect the validity of other terms or conditions.

5 B. OCTA's failure to insist in any one or more instances upon the performance of any terms or
6 conditions of this Agreement shall not be construed as a waiver or relinquishment of OCTA's right to
7 such performance by CITY or to future performance of such terms or conditions and CITY obligation in
8 respect thereto shall continue in full force and effect. Changes to any portion of this Agreement shall
9 not be binding upon OCTA except when specifically confirmed in writing by an authorized
10 representative of OCTA by way of a written Amendment to this Agreement and issued in accordance
11 with the provisions of this Agreement.

12 **ARTICLE 2. RESPONSIBILITIES OF OCTA**

13 OCTA agrees to the following responsibilities for funding of PROJECT:

14 A. OCTA shall allocate M2 EMP funds as specified in Ordinance No. 3 and pay CITY in
15 accordance to the funding allocation as outlined in Article 7 of this agreement and consistent with
16 requirements of the Restoration Plan.

17 B. OCTA shall provide guidance and oversight of the M2 EMP funds in compliance with M2
18 EMP Restoration Funding Guidelines and other funding source(s) requirements.

19 C. OCTA shall remit to CITY within thirty (30) days of receipt of an acceptable initial
20 payment EMP invoice and within sixty (60) days for an acceptable final payment invoice,
21 reimbursement for restoration work up to the amount as per the September 27, 2010 Board-approved
22 funding allocation for the PROJECT.

23 D. OCTA, or agents of OCTA may upon close-out of PROJECT under this Agreement,
24 perform an audit and or technical review to ensure that EMP Restoration Funding Guidelines policies
25 and procedures were followed. Such audit shall be performed within one hundred eighty (180) days of
26 OCTA receiving the final report for PROJECT. If the audit or technical review determines that any of the
activities performed are ineligible for EMP funding, CITY shall return M2 EMP funding.

ARTICLE 3. RESPONSIBILITIES OF CITY

CITY agrees to the following responsibilities for PROJECT:

A. CITY or CITY's designee will act as the lead agency for all phases of PROJECT approved for M2 EMP funding.

B. CITY agrees that M2 EMP funding is subject to CITY meeting all of the requirements outlined in the M2 EMP Restoration Funding Guidelines.

C. CITY agrees to submit reporting and documentation in accordance to the requirements outlined in the M2 EMP Restoration Funding Guidelines.

D. CITY agrees to implement and complete PROJECT funded under this Agreement in accordance with the M2 EMP and application submitted to OCTA.

E. CITY agrees to obligate funds in the programmed year in accordance with the EMP Restoration Funding Guidelines.

F. CITY agrees that OCTA reserves the right to amend this agreement to be consistent with the approved HCP/NCCP.

G. CITY shall return all funds within thirty (30) days of OCTA's written order if CITY uses funds for any purpose other than restoration activities that would enable OCTA to obtain the proper assurances from the Wildlife Agencies and CITY shall be deemed ineligible to receive EMP funds for a period of five (5) years.

H. CITY shall produce sign(s) acknowledging receipt of M2 EMP funds and post them at project site.

I. CITY shall obtain an appropriate conservation easement or deed restrictions governing the perpetual use of the restoration area within one year of PROJECT commencement. The conservation easement or deed restrictions will be approved by OCTA and Wildlife Agencies prior to its recording. CITY has an existing conservation easement covering 20 acres of the first phase of restoration on the PROJECT site and will amend or implement a new conservation easement for the 23 acres covered by this Agreement.

ARTICLE 4. OCTA DESIGNEE

The Chief Executive Officer of OCTA, or designee, shall have the authority to act for and exercise any of the rights of OCTA as set forth in this Agreement.

ARTICLE 5. RESTORATION PLAN

A. CITY shall perform the work necessary to complete in a manner satisfactory to OCTA the services set forth in the CITY-prepared "Restoration Plan," which is attached to and, by this reference, incorporated in and made a part of this Agreement as Exhibit A. CITY shall provide the personnel listed below to perform the above-specified services, which persons are hereby designated as key personnel under this Agreement.

<u>Names</u>	<u>Functions</u>
Bart Mejia, Parks Project Manager	Project Manager
Robert Staples, Contract Administrator	Project Administrator

B. No person named in paragraph A of this Article, or his/her successor approved by OCTA, shall be removed or replaced by CITY, nor shall his/her agreed-upon function or level of commitment hereunder be changed, without the prior written consent of OCTA. Should the services of any key person become no longer available to CITY, the resume and qualifications of the proposed replacement shall be submitted to OCTA for approval as soon as possible, but in no event later than seven (7) calendar days prior to the departure of the incumbent key person, unless CITY is not provided with such notice by the departing employee. OCTA shall respond to CITY within seven (7) calendar days following receipt of these qualifications concerning acceptance of the candidate for replacement.

ARTICLE 6. TERM OF AGREEMENT

This Agreement shall commence upon the effective date of this Agreement, and shall continue in full force and effect through the mitigation reporting and documenting period as set forth in the EMP Restoration Funding Guidelines unless earlier terminated as provided hereunder.

ARTICLE 7. PAYMENT

A. For CITY's full and complete performance of its obligations under this Agreement and subject to the maximum cumulative payment obligation provision set forth in Article 88, OCTA shall pay

CITY on a firm fixed price basis in the amount of \$2,000,000 in accordance with the following provisions.

B. The following schedule shall establish the firm fixed payment to CITY by OCTA for each work task set forth in the Restoration Plan.

<u>Tasks</u>	<u>Firm Fixed Price</u>
<u>Year 1-2011</u> <u>Task 1: Publicly Bid Restoration Project, Award Construction Contract</u> <u>Task 2: Complete Water Delivery System and Grading of Ponds</u> <u>Task 3: Install Temporary Irrigation System</u> <u>Task 4: Begin Planting of CSS, Oak Woodland , Native Grassland and Wetlands</u>	<u>\$1,500,000</u>
<u>Year 2-2012</u> <u>Task 1: Complete Planting of CSS, Oak Woodland , Native Grassland and Wetlands</u> <u>Task 2: Begin 1st Year Plant Establishment and Monitoring</u>	<u>\$240,000</u>
<u>Year 3-2013</u> <u>Task 1: Complete 1st Year Plant Establishment and Monitoring</u>	<u>\$100,000</u>
<u>Year 4-2014</u> <u>Task 1: Complete 2nd Year Plant Establishment and Monitoring</u>	<u>\$50,000</u>
<u>Year 5-2015</u> <u>Task 1: Complete 3rd Year Plant Establishment and Monitoring</u>	<u>\$20,000</u>
<u>Year 6-2016</u> <u>Task 1: Complete 4th Year Plant Establishment and Monitoring</u>	<u>\$20,000</u>

<p><u>Year 7-2017</u></p> <p><u>Task 1: Complete 5th Year Plant Establishment and Monitoring</u></p> <p><u>Task 2: Submit Final Maintenance and Monitoring Report to Regulatory Agencies for CSS, Wetlands and Native Grasslands</u></p>	<p><u>\$20,000</u></p>
<p><u>Year 8-2018</u></p> <p><u>Task 1: Complete 6th Year Plant Establishment and Monitoring for Oak Woodland</u></p>	<p><u>\$10,000</u></p>
<p><u>Year 9-2019</u></p> <p><u>Task 1: Complete 7th Year Plant Establishment and Monitoring for Oak Woodland</u></p>	<p><u>\$10,000</u></p>
<p><u>Year 10-2020</u></p> <p><u>Task 1: Complete 8th Year Plant Establishment and Monitoring for Oak Woodland</u></p>	<p><u>\$10,000</u></p>
<p><u>Year 11-2021</u></p> <p><u>Task 1: Complete 9th Year Plant Establishment and Monitoring for Oak Woodland</u></p>	<p><u>\$10,000</u></p>
<p><u>Year 12-2022</u></p> <p><u>Task 1: Complete 10th Year Plant Establishment and Monitoring for Oak Woodland</u></p> <p><u>Task 2: Submit Final Maintenance and Monitoring Report to Regulatory Agencies for Oak Woodland</u></p>	<p><u>\$10,000</u></p>
<p><u>TOTAL</u></p>	<p><u>\$2,000,000</u></p>

C. CITY shall invoice OCTA at a minimum of at least once per quarter for payments corresponding to the work actually completed by CITY. Percentage of work completed shall be documented in a progress report prepared by CITY, which shall accompany each invoice submitted by CITY. CITY shall also furnish such other information as may be requested by OCTA to substantiate the validity of an invoice. At its sole discretion, OCTA may decline to make full payment for any task listed

1 in paragraph B of this Article until such time as CITY has documented to OCTA's satisfaction, that CITY
2 has fully completed all work required under the task. OCTA's payment in full for any task completed
3 shall not constitute OCTA's final acceptance of CITY's work under such task.

4 D. Each invoice shall be accompanied by a progress report specified in paragraph B of this
5 Article. OCTA shall remit payment within thirty (30) calendar days of the receipt and approval of each
6 invoice. Each invoice shall include the following information:

- 7 1. Agreement No. C-1-2394;
- 8 2. The time period covered by the invoice;
- 9 3. Total invoice (including project-to-date cumulative invoice amount); and retention;
- 10 4. Progress Report;
- 11 5. Certificate signed by the CITY or his/her designated alternate that a) The invoice is a
12 true, complete and correct statement of reimbursable costs and progress; b) The backup information
13 included with the invoice is true, complete and correct in all material respects; c) All payments due and
14 owing to subcontractors and suppliers have been made; d) Timely payments will be made to
15 subcontractors and suppliers from the proceeds of the payments covered by the certification and; e)
16 The invoice does not include any amount which CITY intends to withhold or retain from a subcontractor
17 or supplier unless so identified on the invoice;

18 6. Any other information as agreed or otherwise requested by OCTA to substantiate
19 the validity of an invoice.

20 **ARTICLE 8. MAXIMUM OBLIGATION**

21 Notwithstanding any provisions of this Agreement to the contrary, OCTA and CITY mutually
22 agree that OCTA's maximum cumulative payment obligation (including obligation for CITY's profit) shall
23 be Two Million Dollars (\$2,000,000.00) which shall include all amounts payable to CITY for its
24 subcontracts, leases, materials and costs arising from, or due to termination of, this Agreement.

25 **ARTICLE 9. NOTICES**

26 All notices hereunder and communications regarding the interpretation of the terms of this
Agreement, or changes thereto, shall be effected by delivery of said notices in person or by depositing

said notices in the U.S. mail, registered or certified mail, returned receipt requested, postage prepaid and addressed as follows:

To CITY:
City of Costa Mesa
77 Fair Drive, PO Box 1200
Costa Mesa, CA 92628

To OCTA:
Orange County Transportation Authority
550 South Main Street
P.O. Box 14184
Orange, CA 92863-1584

ATTENTION: Bart Mejia
Project Manager
Phone: (714) 754-5291
Fax: (714) 754-5028
Email: bmejia@ci.costa-mesa.ca.us

ATTENTION: Sarah Strader
Senior Contract Administrator
Phone: (714) 560 – 5633
Fax: (714) 506 – 5792
Email: sstrader@octa.net

ARTICLE 10. INDEPENDENT CONTRACTOR

CITY's relationship to OCTA in the performance of this Agreement is that of an independent CONTRACTOR. CITY's personnel performing services under this Agreement shall at all times be under CITY's exclusive direction and control and shall be employees of CITY and not employees of OCTA. CITY shall pay all wages, salaries and other amounts due its employees in connection with this Agreement and shall be responsible for all reports and obligations respecting them, such as social security, income tax withholding, unemployment compensation, workers' compensation and similar matters.

ARTICLE 11. INSURANCE

A. CITY shall procure and maintain insurance coverage during the entire term of this Agreement. The following coverage shall be full coverage and not subject to self-insurance provision. CITY shall provide the following insurance coverage:

1. Commercial General Liability, to include Products/Completed Operations,

1 Independent CITYs', Contractual Liability, and Personal Injury with a minimum limit of \$1,000,000.00
2 per occurrence and \$2,000,000.00 general aggregate.

3 2. Workers' Compensation with limits as required by the State of California including a
4 waiver of subrogation in favor of OCTA, its officers, directors, employees and agents;

5 3. Employers' Liability with minimum limits of \$1,000,000.00; and

6 B. Proof of such coverage, in the form of an insurance company issued policy endorsement
7 and a broker-issued insurance certificate, must be received by OCTA prior to commencement of any
8 work. Proof of insurance coverage must be received by OCTA within ten (10) calendar days from the
9 effective date of this Agreement with OCTA, its officers, directors, employees and agents designated as
10 additional insured on the general and automobile liability. Such insurance shall be primary and non-
11 contributive to any insurance or self-insurance maintained by OCTA. Furthermore, OCTA reserves the
12 right to request certified copies of all related insurance policies.

13 C. CITY shall include on the face of the certificate of Insurance the Agreement Number C-1-
14 2394 C-1-2394; and, the Contract Administrator's Name, Sarah Strader, Senior Contract Administrator.

15 D. CITY shall also include in each subcontract agreement the stipulation that subcontractors
16 shall maintain insurance coverage in the amounts required from CITY as provided in this Agreement.

17 **ARTICLE 12. ORDER OF PRECEDENCE**

18 Conflicting provisions hereof, if any, shall prevail in the following descending order of
19 precedence: (1) the provisions of this Agreement, including all exhibits; (2) the provisions of EMP
20 Restoration Funding Guidelines; (3) CITY's Restoration Plan dated November 3, 2010, and (4) all other
21 documents, if any, cited herein or incorporated by reference.

22 **ARTICLE 13. CHANGES**

23 By written notice or order, OCTA may, from time to time, order work suspension and/or make
24 changes in the general scope of this Agreement, including, but not limited to, the services furnished to
25 OCTA by CITY as described in the Restoration Plan. If any such work suspension or change causes
26 an increase or decrease in the price of this Agreement or in the time required for its performance, CITY
shall promptly notify OCTA thereof and assert its claim for adjustment within ten (10) days after the

change or work suspension is ordered, and an equitable adjustment shall be negotiated. However, nothing in this clause shall excuse CITY from proceeding immediately with the Agreement as changed.

ARTICLE 14. DISPUTES

A. Except as otherwise provided in this Agreement, any dispute concerning a question of fact arising under this Agreement which is not disposed of by supplemental agreement shall be decided by OCTA's Director, Contracts Administration and Materials Management (CAMM), who shall reduce the decision to writing and mail or otherwise furnish a copy thereof to CITY. The decision of the Director, CAMM, shall be final and conclusive.

B. The provisions of this Article shall not be pleaded in any suit involving a question of fact arising under this Agreement as limiting judicial review of any such decision to cases where fraud by such official or his representative or board is alleged, provided, however, that any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith or is not supported by substantial evidence. In connection with any appeal proceeding under this Article, CITY shall be afforded an opportunity to be heard and to offer evidence in support of its appeal.

C. Pending final decision of a dispute hereunder, CITY shall proceed diligently with the performance of this Agreement and in accordance with the decision of OCTA's Director, CAMM. This "Disputes" clause does not preclude consideration of questions of law in connection with decisions provided for above. Nothing in this Agreement, however, shall be construed as making final the decision of any OCTA official or representative on a question of law, which questions shall be settled in accordance with the laws of the state of California.

ARTICLE 15. TERMINATION

A. OCTA may terminate this Agreement for its convenience any time, in whole or part, by giving CITY written notice thereof. Upon said notice, OCTA shall pay CITY its allowable costs incurred to date of termination and those allowable costs determined by OCTA to be reasonably necessary to effect such termination. Thereafter, CITY shall have no further claims against OCTA under this Agreement.

1 B. OCTA may terminate this Agreement for CITY's default if a federal or state proceeding for
2 the relief of debtors is undertaken by or against CITY, or if CITY makes an assignment for the benefit of
3 creditors, or for cause if CITY fails to perform in accordance with the Restoration Plan or breaches any
4 terms or violates any provisions of this Agreement and does not cure such breach or violation within ten
5 (10) calendar days after written notice thereof by OCTA.

6 **ARTICLE 16. INDEMNIFICATION**

7 CITY shall indemnify, defend and hold harmless OCTA, its officers, directors, employees and
8 agents from and against any and all claims (including attorneys' fees and reasonable expenses for
9 litigation or settlement) for any loss or damages, bodily injuries, including death, damage to or loss of
10 use of property caused by the negligent acts, omissions or willful misconduct by CITY, its officers,
11 directors, employees, agents, subcontractors or suppliers in connection with or arising out of the
12 performance of this Agreement.

13 **ARTICLE 17. AUDIT AND INSPECTION OF RECORDS**

14 CITY shall provide OCTA, or other agents of OCTA, such access to CITY's accounting books,
15 records, work data, documents and facilities, as OCTA deems necessary. CITY shall maintain such
16 books, records, data and documents in accordance with generally accepted accounting principles and
17 shall clearly identify and make such items readily accessible to such parties during CITY's performance
18 hereunder and for a period of four (4) years from the date of final payment by OCTA. OCTA's right to
19 audit books and records directly related to this Agreement shall also extend to all first-tier
20 subcontractors identified in Article 16 of this Agreement. CITY shall permit any of the foregoing parties
21 to reproduce documents by any means whatsoever or to copy excerpts and transcriptions as
22 reasonably necessary.

23 **ARTICLE 18. CONFLICT OF INTEREST**

24 CITY agrees to avoid organizational conflicts of interest. An organizational conflict of interest
25 means that due to other activities, relationships or contracts, the CITY is unable, or potentially
26 unable to render impartial assistance or advice to the OCTA; CITY's objectivity in performing the
work identified in the Restoration Plan or might be otherwise impaired; or the CITY has an unfair

1 competitive advantage. CITY is obligated to fully disclose to the OCTA in writing Conflict of Interest
2 issues as soon as they are known to the CITY. All disclosures must be submitted in writing to OCTA
3 pursuant to the Notice provision herein. This disclosure requirement is for the entire term of this
4 Agreement.
5

6 **ARTICLE 19. CODE OF CONDUCT**

7 CITY agrees to comply with the OCTA's Code of Conduct as it relates to Third-Party
8 contracts which is hereby referenced and by this reference is incorporated herein. CITY agrees to
9 include these requirements in all of its subcontracts.

10 **ARTICLE 20. FEDERAL, STATE AND LOCAL LAWS**

11 CITY warrants that in the performance of this Agreement, it shall comply with all applicable
12 federal, state and local laws, statutes and ordinances and all lawful orders, rules and regulations
13 promulgated thereunder.

14 **ARTICLE 21. EQUAL EMPLOYMENT OPPORTUNITY**

15 In connection with its performance under this Agreement, CITY shall not discriminate against
16 any employee or applicant for employment because of race, religion, color, sex, age or national origin.
17 CITY shall take affirmative action to ensure that applicants are employed, and that employees are
18 treated during their employment, without regard to their race, religion, color, sex, age or national origin.
19 Such actions shall include, but not be limited to, the following: employment, upgrading, demotion or
20 transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of
21 compensation; and selection for training, including apprenticeship.

22 **ARTICLE 22. PROHIBITED INTERESTS**

23 CITY covenants that, for the term of this Agreement, no director, member, officer or employee of
24 OCTA during his/her tenure in office/employment or for one (1) year thereafter shall have any interest,
25 direct or indirect, in this Agreement or the proceeds thereof.

26 **ARTICLE 23. OWNERSHIP OF REPORTS AND DOCUMENTS**

1 A. The originals of all letters, documents, reports and other products and data produced under
2 this Agreement shall be delivered to, and become the property of OCTA. Copies may be made for
3 CITY's records but shall not be furnished to others without written authorization from OCTA. Such
4 deliverables shall be deemed works made for hire and all rights in copyright therein shall be retained by
5 OCTA. OCTA hereby grants exclusive use of deliverables by CITY for the purpose of publication in
6 peer-reviewed scientific journals and other research publications. CITY shall acknowledge OCTA in all
7 such publications.

8 B. All ideas, memoranda, specifications, plans, manufacturing, procedures, drawings,
9 descriptions, and all other written information submitted to CITY in connection with the performance of
10 this Agreement shall not, without prior written approval of OCTA, be used for any purposes other than
11 the performance for this project or publication in scientific and research journals or reports with
12 appropriate acknowledgement in accordance with paragraph A above, nor be disclosed to an entity not
13 connected with the performance of the project. CITY shall comply with OCTA's policies regarding such
14 material. Nothing furnished to CITY, which is otherwise known to CITY or becomes generally known to
15 the related industry shall be deemed confidential. CITY shall not use OCTA's name, photographs of
16 the project, or any other publicity pertaining to the project in any magazine, trade paper, newspaper,
17 seminar or other medium without the express written consent of OCTA, with the exception of scientific
18 and research reports and journals in accordance with paragraph A above.

19 C. No copies, sketches, computer graphics or graphs, including graphic art work, are to be
20 released by CITY to any other person or agency except after prior written approval by OCTA, except as
21 necessary for the performance of services under this Agreement. All press releases, including graphic
22 display information to be published in newspapers, magazines, etc., are to be handled only by OCTA
23 unless otherwise agreed to by CITY and OCTA. CITY may discuss and/or display images of, and
24 general (non-technical and non-confidential) information about the PROJECT on its website(s), after
25 consultation with and approval by OCTA, which shall not be unreasonably withheld.

26 **ARTICLE 24. PATENT AND COPYRIGHT INFRINGEMENT**

A. In lieu of any other warranty by OCTA or CITY against patent or copyright infringement,

1 statutory or otherwise, it is agreed that CITY shall defend at its expense any claim or suit against OCTA
2 on account of any allegation that any item furnished under this Agreement or the normal use or sale
3 thereof arising out of the performance of this Agreement, infringes upon any presently existing U. S.
4 letters patent or copyright and CITY shall pay all costs and damages finally awarded in any such suit or
5 claim, provided that CITY is promptly notified in writing of the suit or claim and given authority,
6 information and assistance at CITY's expense for the defense of same. However, CITY will not
7 indemnify OCTA if the suit or claim results from: (1) OCTA's alteration of a deliverable, such that said
8 deliverable in its altered form infringes upon any presently existing U.S. letters patent or copyright; or (2)
9 the use of a deliverable in combination with other material not provided by CITY when such use in
10 combination infringes upon an existing U.S. letters patent or copyright.

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

18 **ARTICLE 25. RESTORATION ACTIVITIES WITHIN FUNDING LIMITATIONS**

19 A. In order to ensure the accuracy of the PROJECT for the benefit of the EMP and OCTA's
20 budget process, CITY shall accomplish the PROJECT activities required under this Agreement so as to
21 perform the restoration work at a price that does not exceed the estimated cost as set forth by CITY.

22 B. CITY will promptly advise OCTA if it finds that the PROJECT will exceed or is likely to
23 exceed the funding limitations and it is unable to perform restoration work within these limitations. Upon
24 receipt of such information, OCTA will review CITY's revised estimate of restoration work. OCTA may
25 authorize changes in PROJECT activities upon CITY conferring with OCTA and Wildlife Agencies.

26 **ARTICLE 26. ALCOHOL AND DRUG POLICY**

A. CITY agrees to establish and implement an alcohol and drug program that complies with

41 U.S.C. sections 701-707, (the Drug Free Workplace Act of 1988), which is attached to this Agreement as Exhibit B. CITY agrees to produce any documentation necessary to establish its compliance with sections 701-707.

B. Failure to comply with this Article may result in nonpayment or termination of this Agreement.

ARTICLE 27. HEALTH AND SAFETY REQUIREMENTS

ARTICLE 28. CITY SHALL COMPLY WITH ALL OF THE REQUIREMENTS SET FORTH IN EXHIBIT C, LEVEL 1 SAFETY SPECIFICATIONS . AS USED THEREIN, "CITY" SHALL MEAN "CONSULTANT." FORCE MAJEURE

Either party shall be excused from performing its obligations under this Agreement during the time and to the extent that it is prevented from performing by an unforeseeable cause beyond its control, including but not limited to: any incidence of fire, flood; acts of God; commandeering of material, products, plants or facilities by the federal, state or local government; national fuel shortage; or a material act or omission by the other party; when satisfactory evidence of such cause is presented to the other party, and provided further that such nonperformance is unforeseeable, beyond the control and is not due to the fault or negligence of the party not performing.

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This Agreement shall be made effective upon execution by both parties.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement No. C-1-2394 to be executed on the date first above written.

CITY OF COSTA MESA

ORANGE COUNTY TRANSPORTATION AUTHORITY

By _____
Gary Monahan
Mayor

By _____
Will Kempton
Chief Executive Officer

APPROVED AS TO FORM:

APPROVED AS TO FORM:

By _____
Kimberly Barlow
City Attorney

By _____
Kennard R. Smart, Jr.
General Counsel

APPROVED:

By _____
Kia Mortazavi
Executive Director, Planning

Date _____

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