

**CITY OF LOMPOC
DEPARTMENT OF PUBLIC WORKS
CALIFORNIA**



**Consultant Services Agreement
With
Applied EarthWorks, Inc.**

AGREEMENT NUMBER: CS-01-W-2

TITLE OF AGREEMENT: ARCHAEOLOGICAL AND NATIVE AMERICAN MONITORING, AND ARCHAEOLOGICAL TESTING, EVALUATION, AND DATA RECOVERY SERVICES FOR THE UNIVERSITY PARK WATER LINE REPLACEMENT PROJECT, CITY OF LOMPOC

THIS AGREEMENT for Consultant Services is entered into on _____, 2008, by and between the **City of Lompoc**, a California municipal corporation, hereinafter called the "CITY" and **Applied EarthWorks, Inc.** hereinafter called the "CONSULTANT."

WITNESETH:

WHEREAS, CITY desires to secure necessary Professional Consulting services relating to the subject Archaeological Services (herein called the "Project") in accordance with the terms of this Agreement, and

WHEREAS, CONSULTANT represents that it is willing and able to provide such services,

NOW, THEREFORE, for good and valuable consideration, CITY and CONSULTANT mutually agree as follows:

- 1 **CITY CONTRACT WITH CONSULTANT.** CITY hereby engages with CONSULTANT, CONSULTANT agrees to perform the following services, and CITY and CONSULTANT mutually agree to payment of CONSULTANT in the manner and amounts set forth herein and in Exhibit "A", "Request for Proposal," and Exhibit "B," "Proposal," dated August 29, 2008.
- 2 **DESIGNATED REPRESENTATIVE.** Michael Luther, P.E., Senior Civil Engineer, (805) 875-8272 (voice), (805) 875-8372 (fax), is the Designated Representative of CITY and will administer this Agreement for and on behalf of CITY. M. Colleen Hamilton, M.A., RPA, Principal Investigator, (951) 766-2000 (voice), (951) 766-0020 (fax), is the Designated Representative for CONSULTANT. Changes in Designated Representative shall be made only after Official Notice to the other party. Additionally,

CONSULTANT shall not change Designated Representative or staff managing the project without receiving prior written approval from CITY.

- 3 **OFFICIAL NOTICES.** Notices to either party shall be provided by personal delivery or by depositing them in the United States mail, first class postage prepaid, and addressed as identified on the signature page of this Agreement. Either party may give written notice of a change of mailing address for all purposes under this Agreement.
- 4 **STANDARDS OF PERFORMANCE.** CONSULTANT represents that it has the skills, expertise, and licenses/permits necessary to perform the services required under this Agreement. Accordingly, CONSULTANT shall perform all such services in the manner and according to the standards observed by a competent practitioner of the same profession in which CONSULTANT is engaged. All products of whatsoever nature which CONSULTANT delivers to CITY pursuant to this Agreement shall be prepared in a first class and workmanlike manner and shall conform to the standards of quality normally observed by a person practicing in CONSULTANT's profession. CONSULTANT shall correct or revise any errors or omissions, at CITY's request, without additional compensation. Permits and/or licenses shall be obtained and maintained by CONSULTANT without additional compensation.
- 5 **TAXES.** CITY shall not be responsible for paying any taxes on CONSULTANT's behalf, and should CITY be required to do so by state, federal, or local taxing agencies, CONSULTANT agrees to promptly reimburse CITY for the full value.
- 6 **RESPONSIBILITY OF CITY.** CITY shall provide all information reasonably necessary to CONSULTANT in performing the services required herein.
- 7 **CHANGES.** Changes involving provisions for payment or changes in the Scope Of Services must be approved in writing by the Designated Representative.
- 8 **NOTICE OF NON-CONFORMANCE.** If CITY becomes aware of a nonconformity of the Services with this Agreement, CITY shall give prompt written notice thereof to CONSULTANT who shall promptly conform such services to the requirements of this Agreement.
- 9 **COMPENSATION**
 - 9.1 For services performed per Exhibit "A", "Request for Proposal;" and Exhibit "B," "Proposal," dated DATE," the CITY agrees to pay CONSULTANT a total fee that shall not exceed \$59,433.00 for Phase 1 services, and \$119,214.00 for Phase 2 services, in accordance with said exhibits. This amount does not include Extra Services as defined in Paragraph 11 of this Agreement. CONSULTANT shall be reimbursed for expenses, reasonably and necessarily incurred in the performance of required services, as are approved by the CITY. The compensation for all services pursuant to this Agreement, including all reimbursable expenses and all extra services, shall be paid at the time and in the manner set forth in said Exhibits "A" and "B."
 - 9.2 CONSULTANT shall submit itemized statements to request payment in a format approved by the Designated Representative. CONSULTANT shall keep records concerning payment items on a generally recognized accounting basis and such records shall be maintained for a **period of 3 years** following the completion of the Services assigned. Such records shall be made available for copying, inspection or audit by CITY employees or independent agents during reasonable business hours.
 - 9.3 Federal Acquisition Regulations in Title 48, CFR 31 are the governing factors regarding allowable elements of cost.
 - 9.4 **Payment.** Payment to CONSULTANT will only be made upon receipt by the CITY of acceptable work produced by the CONSULTANT, as set forth in Exhibits "A" and "B," and as approved by the Designated Representative. Such payment shall be based on an itemized statement, filled out and signed by CONSULTANT, covering services performed during the period covered by the itemized statement and supported by such data as the Designated Representative may require.

10 FINAL PAYMENT AND CLAIMS

- 10.1.1 The final payment shall be due and payable after acceptance of the Services by Designated Representative.
- 10.1.2 After acceptance by CITY, CITY will make a proposed final cost in writing of the total amount payable to CONSULTANT, including therein an itemization of said amount, segregated in conformance with the price breakdown in Exhibit "B", "Proposal." All prior estimates and payments shall be subject to correction in the proposed final cost. Within 30 days after said proposed final cost has been submitted to it, CONSULTANT shall submit to CITY its written approval of said proposed final cost or a written statement of all claims it has arising under or by virtue of this Agreement.
- 10.1.3 On CONSULTANT's approval, or if it files no claim within said period of 30 days, CITY will issue a final cost in writing in accordance with the proposed final cost submitted to CONSULTANT and within 30 days thereafter CITY will pay the entire sum so found to be due.

- 11 EXTRA SERVICES OF CONSULTANT.** Extra Services are hereby defined as any services other than the services described in Exhibits "A" and "B" of this Agreement, which are authorized by the Designated Representative and performed by CONSULTANT. Prior to performing Extra Services, CONSULTANT shall submit a written request for Extra Services and obtain the written approval of the Designated Representative. The request for extra services shall at a minimum include a description of the services to be performed, the reason why the Extra Services are needed or required, a schedule of completion of the proposed Extra Services, and a not-to-exceed amount for the performance of the proposed Extra Services. Each approved Extra Services request shall be billed separately. Payment for Extra Services will not be made unless the Services are approved by the Designated Representative in writing with a not-to exceed amount prior to the Extra Services being performed. Consultant shall commence Services on the tasks identified as "Extra Services" only upon written authorization to proceed upon such tasks issued by the Designated Representative.

12 CHANGES

- 12.1 The Designated Representative must approve changes involving provisions for payment or minor changes in the Scope Of Services in writing. Major changes in the Scope Of Services shall require Contract amendment.
- 12.2 CHANGES FOR CONSULTANT'S CONVENIENCE. CONSULTANT may make minor additions, deletions and modifications ("Changes") to the Services that do not materially or adversely affect the Project or other CITY requirements. CONSULTANT shall provide immediate written notice to CITY of such Changes. CITY shall provide CONSULTANT with a written acceptance or dispute of such Changes within ten (10) calendar days after receipt thereof. Unless approved by CITY and CONSULTANT, no such changes shall be authorized which increase this Agreement price, completion date, or alter the payment schedule or scope of services. Errors or omissions by CONSULTANT shall not result in a Change under this paragraph and in the case of such errors or omissions, this Agreement price, completion date, and payment schedule shall not be adjusted without CITY's consent. CONSULTANT shall be solely responsible for correcting CONSULTANT's errors or omissions.
- 12.3 CHANGES FOR CITY'S CONVENIENCE. CITY may make Changes that neither increase CONSULTANT's costs nor adversely affect CONSULTANT's ability to meet the completion date, nor deprive CONSULTANT of the benefits of the payment schedule, or the Agreement price. CITY may also make changes affecting the completion date, payment schedule or Agreement price, provided that CITY agrees to such modifications of the completion date, payment schedule and Agreement price as the case may be, as are established by CONSULTANT. CITY shall provide written notice to CONSULTANT of all changes. CONSULTANT shall provide CITY with a written acceptance or dispute of such changes (and provide proposed modifications of the completion date, payment schedule or Agreement price for changes affecting the same) within thirty (30) calendar days after receipt thereof.

- 12.4 **CHANGES CAUSED BY FORCE MAJEURE EVENTS.** If an event of Force Majeure affects CONSULTANT's costs under this Agreement or CONSULTANT's ability to meet a milestone or completion date, CONSULTANT shall propose in writing an equitable adjustment to this Agreement price, payment schedule and completion date as the case may be, and CITY shall accept or dispute such proposal in writing within thirty (30) calendar days.
- 12.5 **PERFORMANCE PENDING RESOLUTION OF DISPUTES.** Notwithstanding any pending resolution of any dispute under this agreement, CONSULTANT shall proceed with the performance of any Changes, the total value of which are subject to a good-faith disparity of less than five percent (5%) in the parties' claimed effect on this Agreement price. Pending resolution by agreement, or litigation, if any, and subject to subsequent adjustment to conform to any final agreement or judgment, reimbursement to CONSULTANT shall be adjusted by revising this Agreement price in an amount equal to that claimed by CITY plus one-half (½) the difference between the amount of said claim and the amount claimed by CONSULTANT. The respective payment schedule shall be adjusted accordingly. CONSULTANT shall not be required to proceed with Services related to any Changes pending resolution of disputes regarding the adjustment of the affected payment schedule and completion date where the total value of such Changes are subject to a good faith disparity of more than five percent (5%) in the parties' claimed effect on this Agreement price.
- 12.6 **SUPPORTING DOCUMENTATION.** Claims by CONSULTANT for adjustments to this Agreement price, completion date, and payment schedule shall be supported by documentation such as invoices from vendors and sub-consultants and CONSULTANT's man-hour breakdowns.
- 13 **CITY CAUSED DELAYS.** If an act or omission of CITY affects CONSULTANT's costs or ability to meet a milestone or completion date, CONSULTANT shall propose in writing an equitable adjustment to the respective Agreement price, payment schedule and completion date, as the case may be, and CITY shall accept or dispute such proposal in writing within thirty (30) calendar days.
- 14 **AUTHORIZATION TO PROCEED.** Prior to starting any of the services under this Agreement, CONSULTANT shall be in receipt of a written Authorization to Proceed issued by the Designated Representative that identifies the specific services authorized to proceed.
- 15 **TIME OF BEGINNING AND COMPLETION.** Time is of essence for this Contract.
- 15.1 CONSULTANT shall commence Work upon receipt of written Authorization to Proceed. CONSULTANT agrees to coordinate with CITY as to scheduling and mutually satisfactory completion of the services set forth in Exhibits "A" and "B."
- 15.2 CONSULTANT shall adhere to schedules and deadlines agreed to by CITY and CONSULTANT. CONSULTANT's failure to complete the Services within the time specified, due to avoidable delays, may at the CITY's discretion be considered a material breach of this Agreement. No extension of time to complete any portion of the services called for in this Agreement shall be allowed except upon the express, written approval of the Designated Representative. Consultant shall request, in writing, a time extension for approval by CITY, promptly upon the occurrence of any action causing delay in CONSULTANT's prosecution of the services. The nature of the delay, the corrective actions taken and the impacts on the project schedule shall be described in each request for time extension.
- 16 **OWNERSHIP OF DOCUMENTS.** All documents, computer programs, plans, designs and other intellectual property prepared by CONSULTANT pursuant to this Agreement shall become the property of CITY upon full and complete compensation to CONSULTANT for services performed herein. CONSULTANT will take such steps as are necessary to perfect or to protect the ownership interest of the CITY in such property. CONSULTANT may retain copies of said original documents for CONSULTANT's file.
- 17 **ASSIGNMENT OF AGREEMENT.** CONSULTANT shall not assign, transfer, subcontract, or delegate any right, privilege or interest in this Agreement, or any part thereof, without prior written consent of CITY. Unless otherwise stated in the written consent to an assignment, no assignment will release or discharge the CONSULTANT from any obligation under this Agreement. Nothing contained in this

paragraph shall prevent CONSULTANT from employing independent consultants, associates, and sub-consultants to assist in the performance of the Services.

- 18** **THIRD PARTY RIGHTS.** Nothing in this Agreement shall be construed to give any rights or benefits to anyone other than CITY and CONSULTANT.
- 19** **INDEMNITIES.** CONSULTANT shall perform all services hereunder in a careful, diligent and professional manner and shall indemnify, defend, and hold harmless the CITY, its officials, officers, employees, and volunteers from and against all claims, damages, losses, and expenses including attorney fees arising out of the performance of the Services described herein, caused in whole or in part by willful misconduct or negligent act or omission of the CONSULTANT, anyone directly or indirectly employed by the CONSULTANT or anyone for whose acts CONSULTANT may be liable, except where caused by the active negligence, or willful misconduct of the CITY.
- 20** **INSURANCE REQUIREMENTS.** As part of the consideration of this Agreement, CONSULTANT agrees to obtain and maintain at its sole cost and expense during the life of this Agreement the following insurance with an insurer or insurers satisfactory to the CITY:
- 20.1 Insurance against claims for injuries to persons or damage to property that may arise from or in connection with the performance of the Services hereunder by the CONSULTANT, its agents, representatives, employees, and sub-consultants.
- 20.2 Coverage shall be at least as broad as:
- 20.2.1 Insurance Services Office Commercial General Liability coverage (occurrence from CG 0001).
- 20.2.2 Insurance Services Office Business Auto Coverage form number CA 0001, code 1 (any auto).
- 20.2.3 Worker's Compensation insurance as required by the State of California and Employer's Liability Insurance.
- 20.3 CONSULTANT shall maintain limits not less than:
- 20.3.1 General Liability: \$3,000,000 per occurrence for bodily injury, personal injury and property damage. If Commercial Liability Insurance or other form with a general aggregate limit is used, either the general aggregate shall apply separately to this project/location or the general aggregate limit shall be twice the required occurrence limit.
- 20.3.2 Automobile Liability: \$1,000,000 per accident for bodily injury and property damage.
- 20.3.3 Employer's Liability: \$1,000,000 per accident for bodily injury or disease.
- 20.4 Any deductibles or self-insured retentions must be declared to and approved by the CITY. At the option of the CITY, either: the insurer shall reduce or eliminate such deductibles or self-insured retentions as respects the CITY, its officials, officers, employees and volunteers; or the CONSULTANT shall provide a financial guarantee satisfactory to the CITY guaranteeing payment of losses and related investigations, claim administration and defense expenses.
- 20.5 The general liability and automobile liability policies are to contain, or be endorsed to contain, the following provisions:
- 20.5.1 The City, its officers, officials, employees and volunteers are to be covered as additional insureds as respects: liability arising out of work or operations performed by or on behalf of the Consultant; or automobiles owned, leased, hired or borrowed by the Consultant.
- 20.5.2 For any claims related to this project, the CONSULTANT's insurance coverage shall be primary insurance as respects the CITY, its officials, officers, employees, and volunteers. Any insurance or

self-insurance maintained by the CITY, its officials, officers, employees, or volunteers shall be excess of the CONSULTANT's insurance and shall not contribute with it.

- 20.5.3 Each insurance policy required by this clause shall be endorsed to state that coverage shall not be canceled by either party, except after thirty (30) days' prior written notice by certified mail, return receipt requested, has been given to the CITY. In the event the said insurance is cancelled, the CONSULTANT shall, prior to the cancellation date, submit to the CITY new evidence of insurance meeting the requirements and in the amounts herein established.
- 20.6 Insurance shall be placed with insurers with a current A.M. Bests rating of no less than A:VII.
- 20.7 Professional Liability "errors and omissions" insurance shall be placed with insurer or insurers satisfactory to the CITY, with limits of liability not less than one million (\$1,000,000.00) dollars, to cover all insurable claims for professional services rendered by CONSULTANT pursuant to this Agreement.
- 20.8 CONSULTANT shall furnish the CITY with original certificates and amendatory endorsements effecting coverage required by this clause. All certificates and endorsements are to be received and approved by the CITY before Consulting Services commence. The CITY reserves the right to require at anytime complete, certified copies of all required insurance policies, including endorsements affecting the coverage required by these specifications.
- 20.9 CONSULTANT shall include all sub-consultants as insureds under its policies or shall furnish separate certificates and endorsements for each sub-consultant. All coverage and limits for sub-consultants shall be subject to all the requirements stated herein.
- 21 **ENDORSEMENT ON PS&E/OTHER DATA.** The responsible CONSULTANT/engineer shall sign all plans, specifications, estimates (PS&E) and engineering data furnished by him/her and where appropriate, indicate his/her registration number.
- 22 **NONDISCRIMINATION.** During the performance of this Agreement, CONSULTANT shall not unlawfully discriminate against any employee or applicant for employment because of race, religion, color, national origin, ancestry, physical handicap, medical condition, marital status, age (over 40), gender and actual or perceived sexual orientation. CONSULTANT shall insure that the evaluation and treatment of its employees and applicants for employment are free of such discrimination. CONSULTANT shall include the nondiscrimination and compliance provisions of this clause in all lower-tier subcontracts to perform services under this Agreement.
- 23 **WARRANTY AGAINST CONTINGENT FEES.** CONSULTANT warrants that it has not employed or retained any company or person, other than a bona fide employee working for the CONSULTANT, to solicit or secure this Agreement, and that it has not paid or agreed to pay any company or person, other than a bona fide employee, any fee, commission, percentage, brokerage fee, gift, or any other consideration, contingent upon or resulting from the award or formation of this Agreement. For breach or violation of this warranty, the CITY shall have the right to annul this Agreement without liability, or at its discretion to deduct from the Agreement price or consideration, or otherwise recover, the full amount of such fee, commission, percentage, brokerage fee, gift, or contingent fee.
- 24 **COMPLIANCE WITH LAW.** CONSULTANT shall, at its sole cost and expense, comply with all CITY, County, State and Federal ordinances and statutes now in force or which may hereafter be in force with regard to this Agreement. The judgment of any court of competent jurisdiction, or the admission of CONSULTANT in any action or proceeding against CONSULTANT, whether CITY be a party thereto or not, that CONSULTANT has violated any such ordinance or statute, shall be conclusive of that fact as between CONSULTANT and CITY.
- 25 **CALIFORNIA LAW.** This Agreement shall be governed by the laws of the State of California. Any litigation regarding this Agreement or its contents shall be filed in the County of Santa Barbara, if in State court, regardless of where else venue may lie.

- 26** **TERMINATION OF THIS AGREEMENT.** This Agreement may be terminated by either party upon written notice to the other party in the event of a substantial failure of performance by such other party; or if CITY should decide to abandon or indefinitely postpone the Project; or if CONSULTANT becomes insolvent, makes a general assignment for the benefit of creditors, suffers or permits the appointment of receiver for its business or assets, files for relief from creditors under any bankruptcy or insolvency law whether domestic or foreign, or has wound up or liquidated, voluntarily or otherwise. If such termination occurs, CITY shall pay CONSULTANT for Services completed.
- 26.1 In the event of such termination, CITY shall pay CONSULTANT for all services performed to the date of receipt of Notice of Termination. An itemized statement of the Services performed to the date of termination shall be submitted to CITY. In ascertaining the services actually rendered hereunder up to the date of termination of this Agreement, consideration shall be given to both completed Services and Services in process of completion and to completion of the incomplete drawings and other documents whether delivered to CITY or in the possession of CONSULTANT. All documents, original tracings, and specifications shall be the property of CITY and may be reused by CITY without additional compensation to CONSULTANT.
- 27** **RELATIONSHIP BETWEEN CONSULTANT AND CITY.** It is expressly understood between the parties to this Agreement that no employee/employer relationship is intended; the relationship of CONSULTANT to CITY being that of an independent contractor.
- 28** **CONFLICT OF INTEREST.** While this Agreement is in force and effect, CONSULTANT shall accept no Services or perform any services that would constitute a conflict of interest with CITY. CONSULTANT agrees to promptly notify CITY whenever CONSULTANT or a client of CONSULTANT has an interest that may constitute such a conflict of interest with CITY.
- 29** **ATTORNEY FEES.** If it becomes necessary to proceed with litigation to enforce any rights created by this Agreement, the prevailing party shall be entitled to reimbursement by the losing party for all costs of such litigation. Such costs shall include reasonable attorney fees.
- 30** **AUTHORITY.** All parties to this Agreement warrant and represent that they have the power and authority to enter into this Agreement in the names, titles and capacities herein stated and on behalf of any entities, persons, or firms represented or purported to be represented by such entity(ies), person(s), or firm(s) and that all formal requirements necessary or required by any state and or/federal law in order to enter into this Agreement have been fully complied with. Furthermore, by entering into this Agreement, CONSULTANT hereby warrants that it shall not have breached the terms or conditions of any other contract or agreement to which CONSULTANT is obligated, which breach would have a material effect hereon.
- 31** **PRECEDENCE.** In the event of conflict between the provisions contained in the numbered sections of this Agreement and the provisions contained in the Exhibits, the provisions in the Exhibits shall prevail over those in the numbered sections.
- 32** **EXHIBITS.** The Exhibits listed below are incorporated by reference in this Agreement:
- 32.1 Exhibit "A" - "Request for Proposal", 11 pages.
- 32.2 Exhibit "B" - "Proposal," dated August 29, 2008, 16 pages + 5 pages Labor Allocation Tables.

33 **INTEGRATION.** This Agreement represents the entire agreement between the parties. It supersedes all prior or extemporaneous communications, representations, or agreements, whether oral or written, relating to the subject matter of this Agreement. No amendment or modification of this Agreement shall be valid unless evidenced in writing and executed by the parties hereto.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement to be executed and entered into this _____ day of _____ 2008.

CITY OF LOMPOC
a California municipal corporation
P.O. Box 8001
Lompoc, California 93438-8001

CONSULTANT
Applied EarthWorks, Inc.
3292 East Florida Avenue, Suite A
Hemet, California 92544

Dick DeWees
Mayor

By: _____
Title: _____

ATTEST:

Donna Terrones, CMC
City Clerk

APPROVED AS TO FORM:

Sharon D. Stuart
City Attorney