

ENGINEERING SERVICES AGREEMENT

THIS AGREEMENT is between the City of Newport, an Oregon municipal corporation (City), and Brown and Caldwell, Inc., a California corporation, which has a principal who is a registered engineer of the State of Oregon (Engineer).

RECITALS

- A. City issued an RFQ for a wide range of engineering services, seeking one or more qualified consulting engineering firms to assist the City on projects that the City does not have the resources to complete in-house. Among other areas, the proposals sought engineers to assist on waste water conveyance and treatment projects. The RFQ anticipated that the City could select specific proposers for specific areas of expertise.
- B. City needs engineering assistance for various projects related to waste water conveyance and treatment.
- C. City has selected Engineer as the best qualified proposer with the expertise to provide engineering services for various waste water conveyance and treatment projects and desires to engage the Engineer to render professional engineering services for waste water conveyance and treatment projects. Engineer is willing and qualified to perform such services.

TERMS OF AGREEMENT

1. Engineer's Scope of Services

Engineer shall perform professional engineering services related to specific waste water conveyance and treatment projects pursuant to Task Orders executed by both parties and attached to this Agreement by reference. This Agreement does not require the City to utilize Engineer for any or all projects related waste water conveyance and treatment. The City is free to utilize other engineers or consultants for waste water projects as it deems appropriate.

2. Effective Date and Duration

This agreement is effective on execution by both parties and shall expire, unless otherwise terminated or extended upon three (3) years from the effective date. The parties may extend the term by mutual agreement.

3. Engineer's Fee and Schedules

A. Fee

Fees for services under this Agreement shall be based on time and materials and pursuant to the rates shown in Exhibit A. Engineer may increase the rates shown

in Exhibit A on an annual basis, subject to the prior written approval of the City. Engineer will submit invoices on a monthly basis for services completed. In order to determine the maximum monetary limit for each Task Order, Engineer will submit a schedule and a labor hour estimate based on the rates shown in Exhibit A. Once a maximum monetary limit (not to exceed amount) is determined, and accepted by the City, Engineer will invoice monthly progress payments based on actual time worked on the project. The maximum monetary limit will not be exceeded without prior written approval by the City.

Engineer may from time to time be asked to perform consultation services not related to a specific project. In such instances, if services are anticipated to be less than \$5,000, a written Task Order may not be required, and Engineer will be reimbursed at the rates shown in Exhibit A. Prior to performing such consultation services, Engineer shall confirm the scope, schedule and anticipated compensation for such services in writing.

Engineer will be reimbursed for services including direct and indirect charges in accordance with the Fee Schedule shown as Exhibit A.

B. Payment Schedule for Basic Fee

Payments shall be made within 30 days of receipt of monthly invoices based on the services completed. Payment shall not be considered acceptance or approval of any work or waiver of any defects therein.

C. Engineer's Invoices

Engineer's invoices shall provide sufficient detail to substantiate all charges. Engineer's accounts related to charges incurred under this Agreement shall be subject to audit by the City. Engineer shall submit invoices in a form satisfactory to the City. At a minimum, each invoice shall identify the Task Order under such work is performed, work completed during the billing period, and for fixed price Task Orders, the percentage of work completed to date and percentage of budget used to date for each task.

D. Identification

Engineer shall furnish to the City its employer identification number.

E. Payment – General

- 1) Engineer shall pay to the Department of Revenue all sums withheld from employees pursuant to ORS 316.167.

- 2) Engineer shall pay employees at least time and a half pay for all overtime worked in excess of 40 hours in any one week except for individuals under the contract who are excluded under ORS 653.010 to 653.261 or under 29 USC sections 201 to 209 from receiving overtime. Any subcontractors utilized by Engineer under this Agreement will be paid according to the then prevailing wage, as applicable.
- 3) Engineer shall make payments promptly, as due, to all persons supplying services or materials for work covered under this Agreement. Engineer shall not permit any lien or claim to be filed or prosecuted against the City on any account of any service or materials furnished hereunder.
- 4) If Engineer fails, neglects or refuses to make prompt payment of any claim for labor, materials, or services furnished to Engineer by a sub-consultant or subcontractor as such claim becomes due, City may pay such claim and charge the amount of the payment against funds due or to become due to the Engineer. The payment of the claim in this manner shall not relieve Engineer or its surety from obligation with respect to any unpaid claims.

F. Schedule

Engineer shall provide services under this Agreement in accordance with the Project Schedule of each Task Order.

4. Ownership of Plans and Documents; Records; Confidentiality

A. Definitions. As used in this Agreement, the following terms have the meanings set forth below:

- 1) Engineer Intellectual Property means any intellectual property owned by Engineer and developed independently from this Agreement that is applicable to the Services or included in the Work Product.
- 2) Third Party Intellectual Property means any intellectual property owned by parties other than City or Engineer that is applicable to the Services or included in the Work Product.
- 3) Work Product means the Services Engineer delivers or is required to deliver to City under this Agreement. Work Product includes every invention, discovery, work of authorship, trade secret or other tangible or intangible item and all intellectual property rights

therein which arise from Engineer's services hereunder, and copies of plans, specifications, reports and other materials, whether completed, partially completed or in draft form.

B. Work Product

- 1) Except as provided elsewhere in this Agreement, all Work Product created by Engineer pursuant to this Agreement, including derivative works and compilations, and whether or not such Work Product is considered a "work made for hire" or an employment to invent, shall, upon payment in full to Engineer, be the exclusive property of City. City and Engineer agree that such original works of authorship are "work made for hire" of which City is the author within the meaning of the United States Copyright Act. To the extent that City is not the owner of the intellectual property rights in such Work Product, Engineer hereby irrevocably assigns to City any and all of its rights, title, and interest in all original Work Product created pursuant to this Agreement, whether arising from copyright, patent, trademark, trade secret, or any other state or federal intellectual property law or doctrine. Upon City's reasonable request, Engineer shall execute such further documents and instruments necessary to fully vest such rights in City. Engineer forever waives any and all rights relating to original Work Product created pursuant to this Agreement, including without limitation, any and all rights arising under 17 USC §106A or any other rights of identification of authorship or rights of approval, restriction or limitation on use or subsequent modifications.
- 2) In the event Engineer Intellectual Property is necessary for the use of any Work Product, Engineer hereby grants to City an irrevocable, non-exclusive, non-transferable, perpetual, royalty-free license to use Engineer Intellectual Property for the purposes described in this Agreement.
- 3) In the event Third Party Intellectual Property is necessary for the use of any Work Product, Engineer shall secure on City's behalf and in the name of City, an irrevocable, non-exclusive, non-transferable, perpetual, royalty-free license to use the Third Party Intellectual Property for the purposes described in this Agreement.
- 4) In the event Work Product created by Engineer under this Agreement is a derivative work based on Engineer Intellectual Property or is a compilation that includes Engineer Intellectual Property, Engineer hereby grants to City an irrevocable, non-exclusive, non-transferable, perpetual, royalty-free license to use the pre-existing elements of Engineer Intellectual Property employed in the Work Product for the purposes described in this Agreement.

- 5) In the event Work Product created by Engineer under this Agreement is a derivative work based on Third Party Intellectual Property, or a compilation that includes Third Party Intellectual Property, Engineer shall secure on City's behalf and in the name of City an irrevocable, non-exclusive, non-transferable, perpetual, royalty-free license to use the pre-existing elements of the Third Party Intellectual Property for the purposes described in this Agreement.
- 6) To the extent permitted by the Oregon Constitution and by the Oregon Tort Claims Act, Engineer shall be indemnified and held harmless by City from liability arising out of re-use or alteration of the Work Product by City which was not specifically contemplated and agreed to by the Parties in this Agreement.
- 7) Engineer may refer to the Work Product in its brochures or other literature that Engineer utilizes for informational and marketing purposes and, unless otherwise specified, Engineer may use standard line drawings, specifications and calculations on other, unrelated projects.

C. Confidential Information

- 1) Engineer acknowledges that it or its employees, subconsultants, subcontractors or agents may, in the course of performing their responsibilities under this Agreement, be exposed to or acquire information that is the confidential information of City or City's residents. Any and all information provided by City and marked confidential, or identified as confidential in a separate writing, that becomes available to Engineer or its employees, subconsultants, subcontractors or agents in the performance of this Agreement shall be deemed to be confidential information of City ("Confidential Information"). Any reports or other documents or items, including software, that result from Engineer's use of the Confidential Information and any Work Product that City designates as confidential are deemed Confidential Information. Confidential Information shall be deemed not to include information that: (a) is or becomes (other than by disclosure by Engineer) publicly known; (b) is furnished by City to others without restrictions similar to those imposed by this Agreement; (c) is rightfully in Engineer's possession without the obligation of nondisclosure prior to the time of its disclosure under this Agreement; (d) is obtained from a source other than City without the obligation of confidentiality; (e) is disclosed with the written consent of City; or (f) is independently developed by employees or agents of Engineer who can be shown to have had no access to the Confidential Information.
- 2) Engineer agrees to hold Confidential Information in strict confidence, using at least the same degree of care that Engineer uses in maintaining the confidentiality of its own confidential

information, and not to copy, reproduce, sell, assign, license, market, transfer or otherwise dispose of, give, or disclose Confidential Information to third parties or use Confidential Information for any purposes whatsoever other than the provision of Services to City under this Agreement, and to advise each of its employees, subconsultants, subcontractors and agents of their obligations to keep Confidential Information confidential. Engineer shall use its best efforts in accordance with applicable standards of care to assist City in identifying and preventing any unauthorized use or disclosure of any Confidential Information. Without limiting the generality of the foregoing, Engineer shall advise City immediately in the event Engineer learns or has reason to believe that any person who has had access to Confidential Information has violated or intends to violate the terms of this Agreement and Engineer will cooperate with City in seeking injunctive or other equitable relief in the name of City or Engineer against any such person. Engineer agrees that, except as directed by City, Engineer will not at any time during or after the term of this Agreement disclose, directly or indirectly, any Confidential Information to any person, except in accordance with this Agreement, and that upon termination of this Agreement or at City's request, Engineer will turn over to City all documents, papers, and other matter in Engineer's possession that embody Confidential Information, provided that Engineer may retain one copy of such Confidential Information for its permanent project records subject to the requirements of this Article. In the event Engineer is required by legal process to disclose any of the Confidential Information, Engineer will provide City prompt notice so that City may seek an appropriate remedy.

- 3) Engineer acknowledges that breach of this Section 4, including disclosure of any Confidential Information, will give rise to irreparable injury to City that is inadequately compensable in damages. Accordingly, City may seek and obtain injunctive relief against the breach or threatened breach of this Section 4, in addition to any other legal remedies that may be available. Engineer acknowledges and agrees that the covenants contained herein are necessary for the protection of the legitimate business interests of City and are reasonable in scope and content.

5. Assignment/Delegation

Neither party shall assign or transfer any interest in or duty under this Agreement without the written consent of the other. If City agrees to assignment of tasks to a subcontractor, Engineer shall be fully responsible for the acts or omissions of any subcontractors. Any approval of a subcontractor does not create a contractual relationship between the subcontractor and City.

6. Engineer is Independent Contractor

- A.** The City’s project director, or designee, shall be responsible for determining whether Engineer’s work product is satisfactory and consistent with this Agreement, but Engineer is not subject to the direction and control of the City. Engineer shall be an independent contractor for all purposes and shall not be entitled to compensation other than the compensation provided for under Section 3 of this Agreement. The City’s acceptance of the work product as satisfactory does not relieve the Engineer from responsibility for any errors in the work product.
- B.** Engineer is an independent contractor and not an employee of City. Engineer acknowledges Engineer’s status as an independent contractor and acknowledges that Engineer is not an employee of the City for purposes of workers compensation law, public employee benefits law, or any other law. All persons retained by Engineer to provide services under this Agreement are employees of Engineer and not of City. Engineer acknowledges that it is not entitled to benefits of any kind to which a City employee is entitled and that it shall be solely responsible for workers compensation coverage for its employees and all other payments and taxes required by law. Furthermore, in the event that Engineer is found by a court of law or an administrative agency to be an employee of the City for any purpose, City shall be entitled to offset compensation due, or to demand repayment of any amounts paid to Engineer under the terms of the Agreement, to the full extent of any benefits or other remuneration Engineer receives (from City or third party) as a result of the finding and to the full extent of any payments that City is required to make as a result of the finding.
- C.** The Engineer represents that no employee of the City or any partnership or corporation in which a City employee has an interest, has or will receive any remuneration of any description from the Engineer, either directly or indirectly, in connection with the letting or performance of this Agreement, except as specifically declared in writing.
- D.** Engineer and its employees, if any, are not active members of the Oregon Public Employees Retirement System.
- E.** Engineer represents that it currently has a City business license or will obtain one prior to delivering services under this Agreement.
- F.** Engineer is not an officer, employee, or agent of the City as those terms are used in ORS 30.265.

7. Indemnity

- A.** The City has relied upon the professional ability and training of the Engineer as a material inducement to enter into this Agreement. Engineer represents to the City that the services under this Agreement will be performed in accordance with the professional standards of skill and care ordinarily exercised by members of the engineering profession under similar conditions and circumstances as well as the requirements of applicable federal, state and local laws, it being understood that acceptance of an Engineer's work by the City shall not operate as a waiver or release. Acceptance of documents by City does not relieve Engineer of any responsibility for design deficiencies, errors or omissions.

- B.** Engineer shall defend, hold harmless and indemnify the City, its officers, agents, and employees from claims, suits, or actions including but not limited to design, professional responsibility, or quality of professional services, to the extent caused by the negligent or otherwise wrongful acts or omissions of Engineer or its subcontractors, subconsultants, agents or employees under this Agreement. This indemnification does not extend to indemnification for negligent or otherwise wrongful acts or omissions of the City. If any aspect of this indemnity shall be found to be illegal or invalid for any reason whatsoever, the illegality or invalidity shall not affect the validity of the remainder of this Agreement.

8. Insurance

Engineer and its subcontractors shall maintain insurance acceptable to City in full force and effect throughout the term of this Agreement as detailed in this section. The insurance shall cover all risks arising out of Engineer's activities or work hereunder, including the operations of its subcontractors of any tier.

The policy or policies of insurance maintained by the Engineer and its subcontractors shall provide at least the following limits and coverages:

- A. Commercial General Liability Insurance**

Commercial General Liability Insurance covering Bodily Injury and Property Damage on an "occurrence" form with policy limits of \$1,000,000 combined single limit per occurrence and \$2,000,000 aggregate. This coverage shall include Contractual Liability and a severability of interests endorsement.

- B. Professional Liability**

Professional Liability Insurance covering claims or losses caused by a negligent act, error, omission of Engineer. The liability limit shall be \$1,000,000 each claim/annual aggregate.

C. Commercial Automobile Insurance

Commercial Automobile Liability coverage for all owned, non-owned, hired, borrowed and leased vehicles. The liability limit per accident shall be \$1,000,000.

D. Workers' Compensation Insurance

The Engineer, its subcontractors and subconsultants, if any, and all employers providing work, labor or materials under this Agreement are subject employers under the Oregon Workers' Compensation Law and shall comply with ORS 656.017, to provide workers' compensation coverage that satisfies Oregon law for all their subject workers. Out-of-state employers must provide Oregon workers' compensation coverage for their workers who work at a single location within Oregon for more than 30 days in a calendar year. Engineers who perform work without the assistance or labor of any employee need not obtain such coverage. This shall include Employer's Liability Insurance with coverage limits of \$500,000 each accident and each employee and policy limit for disease.

E. Additional Insured Provision

The Commercial General Liability Insurance Policy shall include the City, its officers, directors, and employees as additional insureds with respect to this Agreement.

F. Extended Reporting Coverage

If any of the liability insurance is written on a "claims made" basis, Extended Reporting coverage will be required at the completion of this Agreement to a duration of 24 months Engineer will be responsible for furnishing certification of Extended Reporting coverage as described or continuous "claims made" liability coverage for 24 months following Agreement completion. Continuous "claims made" coverage will be acceptable in lieu of Extended Reporting coverage, provided its retroactive date is on or before the effective date of this Agreement.

G. Notice of Cancellation

There shall be no cancellation or intent not to renew insurance coverage without 30 days written notice to the City. Any failure to comply with this provision will not affect the insurance coverage provided to the City. The 30 days' notice of cancellation provision shall be physically endorsed on to the policy.

H. Insurance Carrier Rating

Coverage provided by the Engineer must be underwritten by an insurance company deemed acceptable by the City. The City reserves the right to reject all or any insurance carrier(s) with an unacceptable financial rating.

I. Certificates of Insurance

As evidence of the insurance coverage required by the Agreement, the Engineer shall furnish a Certificate of Insurance to the City. No Agreement shall be effected until the required certificates have been received and approved by the City. The certificate will specify and document all provisions within this Agreement. A renewal certificate will be sent to the address below prior to coverage renewal or expiration.

Lee Ritzman, City Engineer
City of Newport
169 SW Coast Highway
Newport, Oregon 97365

J. Primary Coverage Clarification

The parties agree that Engineer's coverage shall be primary to the extent permitted by law. The parties further agree that other insurance maintained by the City is excess and not contributory insurance with the insurance required in this section.

The procuring of the required insurance by Engineer shall not be construed to limit Engineer's liability under this Agreement. The insurance does not relieve Engineer's obligation for the total amount of any damage, injury, or loss caused by negligence or neglect connected with this Agreement.

9. Termination Without Cause

At any time and without cause, City shall have the right in its reasonable discretion, to terminate this Agreement by giving ten (10) days' written notice to Engineer. If City terminates the Agreement pursuant to this section, it shall pay Engineer for all invoices incurred to the date of termination.

10. Termination With Cause

- A.** City may terminate this Agreement upon ten (10) days' written notice to Engineer, or at such later date as may be established by City, under any of the following conditions:
- 1)** If City funding from federal, state, local, or other sources is not obtained and continued at levels sufficient to allow for the purchase of the indicated quantity of services. Alternatively, this Agreement may be modified to accommodate a reduction in funds.
 - 2)** If Federal or State regulations or guidelines are modified, changed, or interpreted in such a way that the services are no longer allowable or appropriate for purchase under this Agreement.

- 3) If any license or certificate required by law or regulation to be held by Engineer, its subcontractors, agents, and employees to provide the services required by this Agreement is for any reason denied, revoked, or not renewed.

Any termination of this Agreement under paragraph (A) shall be without prejudice to any obligations or liabilities of either party already accrued prior to such termination.

- B. City, by ten (10) days' written notice of default (including material breach of Agreement) to Engineer, may terminate this Agreement:
 - 1) If Engineer fails to provide services called for by this Agreement within the time specified (except for delays which arise through no fault of Engineer), or
 - 2) If Engineer fails to perform any of the other provisions of this Agreement, or fails to pursue the work as to endanger performance of this Agreement in accordance with its terms, and after receipt of written notice from City, fails to correct such failures within ten days or such other period as City may authorize.
- C. If City terminates this Agreement, Engineer shall be entitled to payment for undisputed invoices provided prior to the termination date.
- D. Damages for material breach of Agreement shall be those allowed by Oregon law.

11. Non-Waiver

The failure of City to insist upon or enforce strict performance by Engineer of any of the terms of this Agreement or to exercise any rights hereunder, should not be construed as a waiver or relinquishment to any extent of its rights to assert or rely upon such terms or rights on any future occasion.

12. Notice

All notices, bills and payments shall be made in writing and may be given by personal delivery, mail, or by fax. Payments may be made by personal delivery, mail, or electronic transfer. The following addresses shall be used to transmit notices, bills, payments, and other information:

I

F TO CITY OF NEWPORT

City Engineer
City of Newport
169 SW Coast Highway
Newport, OR 97365
j.voetberg@thecityofnewport.net
541-574-0601

IF TO ENGINEER:

Brown and Caldwell
6500 S.W. Macadam Avenue, Suite 200
Portland, OR 97239
Attention: James Hansen

The date of deposit in the mail shall be the notice date for first class mail.
All other notices, bills and payments shall be effective at the time of actual delivery.
Changes may be made in the names and addresses of the person to whom notices, bills and payments are to be given by giving written notice pursuant to this paragraph.

13. Merger

This writing is intended both as a final expression of the Agreement between the parties with respect to the included terms and as a complete and exclusive statement of the terms of the Agreement. No modification of this Agreement shall be effective unless and until it is made in writing and signed by both parties.

14. Force Majeure

Neither City nor Engineer shall be considered in default because of any delays in completion and responsibilities hereunder due to causes beyond the control and without fault or negligence on the part of the parties so disabled, including but not restricted to, an act of God or of a public enemy, civil unrest, volcano, earthquake, fire, flood, epidemic, quarantine restriction, area-wide strike, freight embargo, unusually severe weather or delay of subcontractors or supplies due to such cause; provided that the parties so disabled shall within ten days from the beginning of such delay, notify the other party in writing of the cause of delay and its probable extent. Such notification shall not be the basis for a claim for additional compensation. Each party shall, however, make all reasonable efforts to remove or eliminate such a cause of delay or default and shall, upon cessation of the cause, diligently pursue performance of its obligation under the Agreement.

15. Non-Discrimination

Engineer agrees to comply with all applicable requirements of federal and state statutes, rules, and regulations. By way of example only, Engineer also shall comply with the Americans with Disabilities Act of 1990, ORS 659.425, and all regulations and administrative rules established pursuant to those laws.

16. Errors

In accordance with applicable standards of care, Engineer shall perform such additional work as may be necessary to correct errors in the work required under this Agreement without undue delays and without additional cost.

17. Extra Work

Extra work or work on Contingency Tasks is not authorized unless the City authorizes the additional or contingency work in writing.

18. Governing Law

The Agreement is subject to Oregon law. Any action or suits involving any question arising under this Agreement must be brought in the appropriate court in Newport, Oregon.

19. Compliance With Applicable Law

Engineer shall comply with all federal, state, and local laws and ordinances applicable to the work under this Agreement, including but not limited to those set forth in ORS 279A, B & C. Some of the required state contract provisions are included in Exhibit B.

20. Conflict Between Terms

This instrument shall control in the event of any conflict between terms between this document and the RFP and/or proposal.

21. Access to Records

City shall have reasonable access to the books, documents, papers and records of Engineer that are directly pertinent to this Agreement for the purpose of making audit, examination, excerpts and transcripts.

22. Audit

Engineer shall maintain records to assure conformance with the terms and conditions of this Agreement, and to assure adequate performance and accurate expenditures within the Agreement period. Engineer agrees to permit City or its duly authorized representatives to audit all records pertaining to this Agreement to assure the accurate expenditure of funds.

23. Severability

In the event any provision or portion of this Agreement is held to be unenforceable or invalid by any court of competent jurisdiction, the validity of the remaining terms and provisions shall not be affected to the extent that it did not materially affect the intent of the parties when they entered into the Agreement.

24. Industrial Accident Fund Payment

Engineer shall pay all contributions or amount due the Industrial Accident Fund form that Engineer or subcontractors incur during the performance of this Agreement.

25. Complete Agreement

This Agreement and any exhibit(s) hereto and any and all Task Orders executed by the parties and the RFP and Response dated _____ constitute the entire agreement between the parties. No waiver, consent, modification, or change of terms of this Agreement shall bind either party unless in writing and signed by both parties. Any waiver, consent, modification, or change if made, shall be effective only in specific instances and for the specific purpose given. There are no understandings, agreements, or representations, oral or written, not specified herein regarding this Agreement. In the event of a conflict between the documents comprising this Agreement, interpretation shall occur in the following manner: 1) each individual Task Order; 2) this Agreement and any exhibits hereto; and 3) the RFP and Response. The following exhibits are attached to this Agreement:

1. Exhibit A – Fees;
2. Exhibit B – Provisions of ORS Chapter 279

26. Dispute Resolution

- A. In the event of a conflict between the parties, the parties agree to first attempt to resolve the conflict using mediation. Both parties acknowledge and agree that participation in mediation is a prerequisite to commencement of litigation or a tort claims notice of any disputes relating to the Agreement. Both parties further agree to exercise their best efforts in good faith to resolve all disputes within sixty (60) days of the commencement of the mediation through the mediation process set forth herein.
- B. The mediator shall be an individual mutually acceptable to both parties, but in the absence of agreement each party shall select a temporary mediator and the temporary mediators shall jointly select the permanent mediator. Each party shall pay its own costs for the time and effort involved in mediation. The cost of the mediator shall be split equally between the two parties. Both parties agree to exercise their best effort in good faith to resolve all disputes in mediation. Participation in mediation is a mandatory requirement of this Agreement. The schedule, time and place for mediation will be mutually

acceptable, or, failing mutual agreement, shall be as established by the mediator. The parties agree to comply with the City's rules governing the confidentiality of mediation, if any, and shall execute all necessary documents to give effect to such confidentiality rules. In any event, the parties shall not subpoena the mediator or otherwise require the mediator to produce records, notes or work product, or to testify in any future proceedings as to information disclosed or representations made in the course of mediation, except to the extent disclosure is required by law.

- C. Unless otherwise directed by the City, Engineer shall continue to proceed diligently with the work while any claim is within the scope of mediation excepting disputes regarding non-payment.

27. Miscellaneous

- A. Engineer agrees that news releases and other publicity to third parties relating to the subject of this Agreement will be made only with the prior written consent of City.
- B. Engineer shall comply with all virus-protection, access control, back-up, password, and other security and other information technology policies of City when using, having access to, or creating systems for any of City's computers, data, systems, personnel, or other information resources.
- C. Engineer represents that Engineer is in compliance with Oregon tax laws pursuant to ORS 305.385
- D. Engineer represents that Engineer does not discriminate in regard to subcontractors as set forth in ORS 279A.110.
- E. Engineer will include in all contracts with subcontractors appropriate provisions as required by ORS 279C.580.
- F. Engineer will comply with environmental and natural resources regulations as set forth in ORS 279B.525 and regulations relating to the salvaging, recycling, composting or mulching yard waste material, and salvage and recycling of construction and demolition debris as set forth in ORS 279B.225 and 270C.510.
- G. **Reliance upon Information Provided by Others.** If Engineer's performance of services hereunder requires Engineer to rely on information provided by City or City's contractors, Engineer shall not independently verify the validity, completeness, or accuracy of such information unless otherwise expressly engaged to do so in writing by City.
- H. **Engineer's Opinion of Costs.** City acknowledges that construction cost estimates, financial analyses and feasibility projections are subject to many influences including, but not limited to, price of labor and materials, unknown

or latent conditions of existing equipment or structures, and time or quality of performance by third parties. City acknowledges that such influences may not be precisely forecasted and are beyond the control of Engineer and that actual costs incurred may vary from the estimates prepared by Engineer. Engineer does not warrant or guarantee the accuracy of construction or development cost estimates. Notwithstanding the foregoing, Engineer will use its best professional judgment in providing opinions to City.

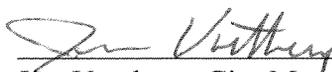
I. Construction Phase Services

- 1) **Engineer's Activities at Construction Site.** During construction, Engineer's personnel, whether as on-site representative, resident engineer, construction manager, or otherwise, may make visits to the site at intervals appropriate to the various stages of construction, as Engineer deems necessary, to observe as an experienced and qualified design professional the progress of Contractor's executed work. Such visits and observations by Engineer's personnel, are not intended to be exhaustive or to extend to every aspect of Contractor's work in progress or to involve detailed inspections of Contractor's work in progress, but rather are to be limited to spot checking, selective sampling, and similar methods of general observation of the work based on Engineer's exercise of professional judgment. The presence of Engineer's personnel at a construction site does not make Engineer responsible for those duties that belong to City and/or construction contractors or others, and does not relieve construction contractors or others of their obligations, duties, and responsibilities, including, but not limited to, construction methods, means, techniques, sequences, and procedures necessary for completing all portions of the construction work in accordance with the contract documents, any health or safety programs and precautions required by such construction work, and any compliance with applicable laws and regulations. Any inspection or observation of the contractor's work is solely for the purpose of determining that the work is generally proceeding in conformance with the intent of the project specifications and contract documents and to notify City if the work is not proceeding in conformance as set forth herein. Through Engineer's observations of Contractor's work in progress and field checks of materials and equipment, Engineer shall endeavor to provide further protection for City against defects and deficiencies in the work. Engineer makes no warranty or guarantee with respect to the performance of a contractor. Engineer has no authority to exercise control over any construction contractor in connection with his work or health or safety programs and precautions. Except to protect Engineer's own personnel and except as may be expressly required elsewhere in the scope of services, Engineer has no duty to inspect, observe, correct, or report on health or safety deficiencies of the construction contractor.

- 2) Shop Drawing and Submittal Review. If required by Engineer's Scope of Services, Engineer shall review shop drawings or other contractor submittals for general conformance with the intent of the contract documents. Engineer shall endeavor to identify defects and deficiencies in Contractor provided shop drawing and submittals. Engineer shall not be required to verify dimensions, to engineer contractor's shop drawings or submittals, nor to coordinate shop drawings or other submittals with other shop drawings or submittals provided by contractor.
- 3) Record Drawings. Record drawings, if required, will be prepared, in part, on the basis of information compiled and furnished by others, and may not always represent the exact location, type of various components, or exact manner in which the Project was finally constructed. Engineer is not responsible for any errors or omissions in the information from others that are incorporated into the record drawings

By their signatures hereunder, the parties acknowledge they have read and understand this Agreement and agree to be bound by its terms. This Agreement is effective on the date last signed below by a party below:

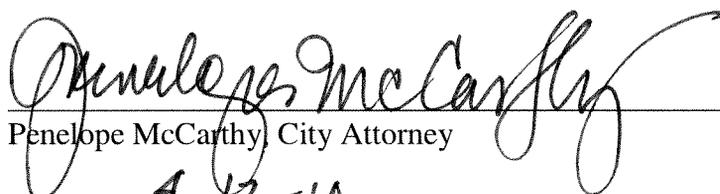
CITY OF NEWPORT:



Jim Voetberg, City Manager

Date: 4-12-10

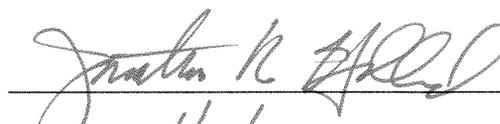
APPROVED AS TO FORM:



Penelope McCarthy, City Attorney

Date: 4-12-10

BROWN AND CALDWELL,
A California Corporation:



Jonathan R. Caldwell

Date: 4/5/10

EXHIBIT A FEES

Unit Costs

The table below presents the hourly labor rates for Brown and Caldwell team members for projects associated with all service categories.

Brown and Caldwell Rate Table	
Category	*Rate, dollars
Drafter, Engineering Aide, Project Coordinator I, Word Processor III	67
Engineer I, Senior Drafter, Assistant Designer, Project Coordinator II	78
Engineer II, Lead Drafter, Designer, Senior Project Coordinator, Administrative Supervisor	93
Engineer III, Supervising Drafter, Senior Designer, Senior Engineering Technician	110
Senior Engineer, Chief Drafter, Principal Designer, Senior Construction Engineer	130
Principal Engineer, Supervising Designer	154
Supervising Engineer	182
Managing Engineer	202
Executive Engineer, Vice President	225
Senior Vice President	225

*Rates are effective through December 31, 2010

Overtime incurred on projects is billed at the standard hourly rates. No equipment or test fees are anticipated for the proposed service categories. Subconsultant activities (e.g., surveying, geotechnical engineering, environmental permitting, public outreach, etc.) are billed at our cost with a 5 percent markup.

Other miscellaneous project expenses are charged at \$8.00 per labor hour for costs that include:

- CAD services
- Color graphics
- Copying
- Facsimile
- Graphics
- Printing
- Personal computer

Billing for Travel

Employee travel time to work sites will be billed at the hourly rates summarized in the table above. There are also specific mobilization charges, minimum charges or trip charges other than mileage charges which are billed at the Internal Revenue Service's Standard Mileage Rates.

Billing for Standby Time

No standby charges are anticipated for any of the service categories for which Brown and Caldwell has applied.

Overhead, Support and Administration Charges

Project support staff will bill to the project at the hourly rates summarized in the table above.

Managerial Charges

Project managerial costs will bill to the project at the hourly rates summarized in the table above. Regularly scheduled Project Delivery Officer reviews occur on all Brown and Caldwell projects.

EXHIBIT B

PROVISIONS OF ORS CHAPTER 279

(Not all provisions fully set forth herein. It is Contractor's obligation to be familiar and comply with all relevant provisions of ORS Chapter 279.)

279B.220 Conditions concerning payment, contributions, liens, withholding. The contractor shall:

1. Make payment promptly, as due, to all persons supplying to the contractor labor or material for the performance of the work provided for in the contract.
2. Pay all contributions or amounts due the Industrial Accident Fund from the contractor or subcontractor incurred in the performance of the contract.
3. Not permit any lien or claim to be filed or prosecuted against the state or a county, school district, municipality, municipal corporation or subdivision thereof, on account of any labor or material furnished.
4. Pay to the Department of Revenue all sums withheld from employees under ORS 316.167.
5. In addition to the conditions specific in subsection 1-4 above, every public improvement contract shall contain a condition that the contractor shall demonstrate that an employee drug testing program is in place. (279C.505)

279C.515 Conditions concerning payment of claims by public officers, payment to persons furnishing labor or materials and complaints.

1. If the contractor fails, neglects or refuses to make prompt payment of any claim for labor or services furnished to the contractor or a subcontractor by any person in connection with the public improvement contract as the claim becomes due, the proper officer or officers representing a municipality, may pay such claim to the person furnishing the labor or services and charge the amount of the payment against funds due or to become due the contractor by reason of the contract.
2. If the contractor or a first-tier subcontractor fails, neglects or refuses to make payment to a person furnishing labor or materials in connection with the public improvement contract within thirty days after receipt of payment from the contracting agency or a contractor, the contractor or first-tier subcontractor shall owe the person the amount due plus interest charges commencing at the end of the ten day period that payment is due under ORS 279C.580 (4) and ending upon final payment, unless payment in ORS 279C.580. The rate of interest charged to the contractor or first-tier subcontractor on the amount due shall equal three times

- a. For all overtime in excess of eight hours in any one day or 40 hours in any one week when the work week is five consecutive days, Monday through Friday; or
 - b. For all overtime in excess of ten hours in any one day or 40 hours in any one week when the work week is four consecutive days, Monday through Friday; and
 - c. For all work performed on Saturday and on any legal holiday specified in ORS 279B.020 (or ORS 279C.540).
2. In the case of contracts for personal services as described in ORS 279A.055, the contract shall contain a provision that the employee shall be paid at least time and a half for all overtime worked in excess of 40 hours in any one week, except for individuals under personal services contracts who are excluded under ORS 653.010 to 653.261 or under 29 U.S.C. 201 to 209 from receiving overtime.
 3. Persons employed shall receive at least time and a half pay for work performed on the legal holidays specified in a collective bargaining agreement or in ORS 279B.020 (1)(b)(B) to (G) and for all time worked in excess of 10 hours in any one day or in excess of 40 hours in any one week, whichever is greater.

279C.830 Relating to prevailing rate of wage in public works contracts.

1. In the event this contract is a public works contract, the parties shall state in the contract the existing state prevailing rate of wage and if applicable, the federal prevailing rate of wage required under the Davis-Bacon Act that may be paid to workers in each trade or occupation required for the public works employed in the performance of the contract either by the contractor or subcontractor or other person doing or contracting to do the whole or any part of the work contemplated by the contract. When the prevailing rates of wage are available electronically or are accessible on the Internet, the rates may be incorporated into the specifications by referring to the electronically accessible or Internet-accessible rates and by providing adequate information about how to access the rates.
2. Every contract and subcontract shall contain a provision that the workers shall contain a provision that the works shall be paid not less than the specified minimum hourly rate of wage in accordance with ORS 279C.838 and 279C.840.
3. Contractor will pay to the Commissioner of the Bureau of Labor and Industries (BOLI) a fee as provided in ORS 279C.825(1). The fee shall be paid to the commissioner under the administrative rule of the commissioner.
4. Every contract for public works shall contain a provision stating that the contractor and every subcontractor must have a public works bond filed with the Construction Contractors Board before starting work on the project, unless exempt under ORS 279C.836 (4), (7), (8) or (9).

- a. For all overtime in excess of eight hours in any one day or 40 hours in any one week when the work week is five consecutive days, Monday through Friday; or
 - b. For all overtime in excess of ten hours in any one day or 40 hours in any one week when the work week is four consecutive days, Monday through Friday; and
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