



Lemoore Union High School District

5 Powell Street, Lemoore, California 93245 - 559/924-6610

To: Lemoore Union High School District Board of Trustees
From: Mark Howard
Date: June 9, 2016
Subject: Contract Approval – Indoor Environmental Services (IES)

Background:

Seeking the Board of Director's review and approval of the enclosed contract with Indoor Environmental Services (IES) to provide design-build energy efficiency services in support of Proposition 39 project planning and execution.

Financial Impact:

Cost of Services:

- 1) Project Planning Fee: **\$22,297**
- 2) Project Costs: **TBD** pending plan approval from the state

LUHSD has been awarded **\$114,734** in planning funding for purposes of conducting an energy audit and ultimately producing an Energy Expenditure Plan. Once approved, LUHSD is scheduled to receive an additional **\$557,436** in Proposition 39 funding to execute the plan. Any unused planning dollars may be used towards execution of approved projects as well.

We intend to design a plan that fits within the Proposition 39 grant award amount so that there is no financial impact to the General Fund.

Recommendation:

Approve the contract.

**AGREEMENT FOR CONSULTATION, AUDIT, PLANNING ACTIVITIES,
AND PROJECT SUPPORT SERVICES
PROPOSITION 39**

This Agreement for Consultation, Audit, Planning Activities, and Project Support Services (“**Agreement**”) is entered into by and between:

Indoor Environmental Services (“**Consultant**”)
Attention: Stan Butts, Vice President
150 Silica Avenue
Sacramento, CA 95815
Phone: (916) 988-8808
Email: sbutts@ies-hvac.com

Lemoore Union High School District (“**District**”)
Attention: Debbie Muro, Superintendent
5 Powell Ave.
Lemoore, CA 93245-2856
Phone: (559) 924-6610
Email: dmuro@luhsd.k12.ca.us

Consultant and District are referred to separately as a “**Party**” and collectively as the “**Parties**”. Unless the context requires otherwise, any reference to a Party in this Agreement shall mean the Party and its governing body and members thereof, officers, employees, and agents.

RECITALS

This Agreement is entered into based on the following recitals, which are a part of this Agreement:

- A. District intends to undertake one or more projects or programs at one or more of District’s sites to improve energy efficiency, expand clean energy generation, and/or implement energy efficiency retrofits and clean energy installations (collectively “**Energy Project**”), and to evaluate financing for such Energy Projects. District expects to receive funding from the State of California under the Clean Energy Jobs Act, Public Resources Code section 26200 et seq., to pay for such Energy Projects.
- B. District desires to retain an experienced and qualified firm to provide consultation, conduct an energy survey and/or audit, assist Owner to prepare and submit required documents to the appropriate government agencies for approval of project(s) and fund disbursements, and assist District to plan for and implement one or more Energy Projects.
- C. Consultant represents that it is specially trained, experienced, qualified, and competent to provide the Services required of Consultant under this Agreement.
- D. After issuing a request for proposals and consideration of responses submitted pursuant thereto, District has selected, and hereby enters into this Agreement with, Consultant. By this Agreement, the Parties desire to set forth the terms and conditions upon which Consultant shall provide, and District shall compensate Consultant for, performance of those obligations required of Consultant under this Agreement, and to set forth the Parties’ rights and obligations relating to this Agreement.

[Remainder of page intentionally left blank]

GENERAL TERMS AND CONDITIONS

These General Terms and Conditions contain the following Sections:

Section 1	Scope of Services and Obligations
Section 2	Compensation to Consultant
Section 3	Term and Termination of Agreement
Section 4	Insurance
Section 5	Indemnity
Section 6	Dispute Resolution
Section 7	General Provisions

Terms with initial capital letter shall have the respective meanings set forth in this Agreement.

ARTICLE 1 SCOPE OF SERVICES AND OBLIGATIONS.

SECTION 1.1 CONSULTANT SERVICES AND OBLIGATIONS.

1.1.1 PROVISIONS APPLICABLE TO ALL SERVICES. The provisions in this Subsection 1.1.1 shall apply to all Services that Consultant provides pursuant to this Agreement.

1.1.1.1 SERVICES DEFINED. **“Services”** shall mean and include the Consultant Services in Section 1.1.2 and the Project Support Services in Section 1.1.3.

1.1.1.2 COMPLIANCE WITH APPLICABLE LAWS. In performing the Services and this Agreement, Consultant shall comply, and require all of its consultants and subcontractors to comply, with the California Clean Energy Jobs Act, Public Resources Code Section 26200 et seq., and any and all regulations, requirements, guidelines, and handbooks adopted or enacted for implementation thereof (collectively **“Proposition 39”**); all California laws applicable to California public school districts relating to public works projects; and policies, regulations and procedures of District that are applicable to Consultant.

1.1.1.3 RECORD RETENTION, INSPECTION, AND AUDIT. Consultant shall maintain accurate books and records of all Services provided under, amounts billed pursuant to, and all documents required of Consultant under this Agreement for at least five years after the date on which this Agreement terminates and make them available for review, audit, and/or copying by or at the request of District. This Agreement is subject, for three years after the final payment is made, to the State Auditor’s examination and audit at District’s request or as part of an audit of District. The provisions of this Subsection shall survive the termination of this Agreement.

1.1.1.4 CONSULTANT TEAM. Consultant shall provide the Services through or under the direction of the following Consultant employees: Chris Bristow, P.E., CEM. Consultant may add other employees and/or consultants without notifying or obtaining Owner’s approval. However, Consultant shall not remove any of the above employees from the team without obtaining Owner’s approval of such removal unless an employee is no longer

1.1.2 CONSULTATION AND TRAINING. Consultant shall provide the following **“Consultant Services”** to District:

1.1.2.1 Provide consultation relating to, among others, energy efficiency projects and programs, Proposition 39 procedures and requirements, additional funding sources for project planning and implementation, and project/program planning and implementation, and post-construction operations and maintenance.

1.1.2.2 Work as part of District’s team to successfully plan for, develop, and implement each Energy Project in compliance with Proposition 39 and other applicable laws.

1.1.2.3 At District's request, train and educate students, staff, and the community about energy conservation and efficiency, and the benefits thereof.

1.1.2.4 At District's request, Consultant will manage all inquiries from the public, media, press, agencies, and other interested parties as to any and all information related to each Energy Project, and any and all outbound communications in the form of email, press release, interview, marketing, verbal, or otherwise. Consultant shall manage communication in the same regard where any contractors, consultants, financiers, or any other project related third parties are concerned.

1.1.3 PROJECT SUPPORT SERVICES. Consultant shall provide the following **“Project Support Services”** to District in accordance with the corresponding Schedule, the Parties understanding and agreeing that: (A) such Schedule is based on the information that is currently available and may need to be adjusted to reflect changes in circumstances or conditions that are not within Consultant's control; and (B) Stage A shall commence on the Effective Date and each Stage thereafter shall commence on the day following the last day of the prior Stage:

Stage	Activities	Schedule (days)
A. Analysis	<ul style="list-style-type: none"> Perform detailed technical and financial analyses in accordance with Proposition 39 to determine District's current energy usage and costs, and potential savings opportunities. These opportunities may include, but are not limited to, lighting, HVAC replacement, controls, renewable power generation, and other energy related scopes of work targeted toward reducing costs and increasing life cycle performance. The analyses will be used to support District's Proposition 39 energy expenditure plan. 	30 – 45
B. Development	<ul style="list-style-type: none"> Develop scope and specifications for energy conservation and clean energy measures that meet District's requirements and Proposition 39 requirements. Prepare and submit Proposition 39 energy expenditure plan(s) after District's review and approval thereof. 	15 – 30
C. Financing	<ul style="list-style-type: none"> In parallel with the Development Stage, work with District or its financial advisor (if any and as needed) to identify and secure financing sources beyond funding from Proposition 39, including but not limited to incentives, rebates, subsidies, grants, no or low-interest loans, and no-charge programs or services. 	30 – 60
D. Proposition 39 Services	<ul style="list-style-type: none"> Provide consultation to and assist District to comply with Proposition 39 during all phases of each Energy Project until completion thereof and including any reporting and auditing relating thereto. In coordination and communication with District, prepare and submit to District for review and approval all analyses, energy expenditure plan(s), reports, and other documents required of District under Proposition 39, obtain the required approvals of all appropriate government agencies, and comply with reporting and auditing requirements of government agencies (collectively “Prop. 39 Documents”). In coordination and communication with District, submit on behalf of District all Prop. 39 Documents to the appropriate 	At the same time as applicable to other Stages

Stage	Activities	Schedule (days)
	government agencies.	
E. Project Contract	<ul style="list-style-type: none"> Provide turn-key, design build construction contract for all CEC approved projects. Pricing to match CEC approved Proposition 39 submission. 	30 – 90
F. Project Oversight	<ul style="list-style-type: none"> Provide general oversight of each Energy Project, which oversight shall be in coordination and communication with the inspector, and/or other third parties who District retains to provide services on the Energy Project. 	30 – 180

1.1.4 EXCLUDED SERVICES AND ADDITIONAL SERVICES. This Agreement does not require Consultant to provide labor, materials, equipment, and transportation to perform construction or installation of any Energy Project and the provision of such is excluded. Except for the Services set forth in this Agreement, District is not obligated to pay Consultant for additional services that Consultant may provide unless such additional services and the amount of compensation therefor

1.2 DISTRICT RESPONSIBILITIES.

1.2.1 RESPONSIBILITIES GENERALLY. District has the following responsibilities in connection with this Agreement:

1.2.1.1 Has ultimate responsibility and discretion for any decision to proceed with an Energy Project and to negotiate and enter into any contracts with third parties to implement such Energy Project.

1.2.1.2 Ensure that any bidding/competitive selection process relating to any contracts with third parties to implement any Energy Project comply with Proposition 39 and other applicable laws.

1.2.1.3 May elect to include any bidders or respondents in the bidding/competitive selection process.

1.2.1.4 Ensure that each Energy Project and any contracts with third parties relating thereto comply with District's other obligations.

1.2.1.5 Perform District's obligations under any contracts with third parties relating to any Energy Project.

1.2.1.6 Provide Consultant access to facilities, sites, or data for activities associated with this Agreement at reasonable times and on Consultant's reasonable advance notice. Consultant shall notify the site administrator prior to entry onto District's property and shall follow the District's policies, regulations, and procedures for entry onto and presence upon District's property.

1.2.1.7 Has ultimate responsibility for applying for any financing for each Energy Project and satisfying the requirements of such financing.

1.2.2 ENERGY PROJECT COSTS. District acknowledges that in addition to the Service Fee payable to Consultant, District is responsible for: (A) all project development and installation costs in connection with each Energy Project, including without limitation, all system installation costs, construction contingency, third party engineering, third party inspection and permitting (including the Division of the State Architect ("DSA")), third party commissioning, inspection and testing,

third party consulting and underwriting costs, insurance costs, and other development costs; (B) any and all, financing costs and reserves, construction debt legal, permanent debt legal, third party financial consulting, principal and interest reserve funds, capitalized interest funds, capital costs of issuance, underwriter's discounts and fees, bond insurance, escrow or trustee costs, and other financing costs; and (C) any operations and maintenance costs of any Energy Project. Consultant shall have no authority to agree or incur on behalf of District, or to bind District to, any costs, debts, obligations, and/or liabilities without approval of District's board of trustees.

- 1.2.3 **THIRD PARTY ENERGY PROJECT CONTRACTS.** Neither the execution of this Agreement, the holding of discussions, negotiations nor the exchange of material or information shall be construed as creating a binding obligation on District to enter into any contracts with third parties to implement or consummate any Energy Project. District reserves and shall have the right, in District's sole discretion, to reject any and all proposals made by any third parties with regard to any Energy Project and to terminate discussions and negotiations of any contracts with any third parties. Such a termination of discussions or negotiations regarding third party contracts will not affect any of the obligations of the Parties under this Agreement. District acknowledges and agrees that if District proceeds with any Energy Project, District will be required to enter into one or more contracts with third parties (including, for example, a power purchase agreement, a site or equipment lease, an engineering, procurement and construction contract and/or other project and financing documents) as agreed by District and the applicable third party(ies). District acknowledges that District is solely responsible for negotiating any contracts with any third parties and ensuring that such contracts adequately protect District and satisfy District's objectives and needs. District acknowledges that Consultant does not control and is not responsible for the performance or conduct of any third parties.

SECTION 1.3 WORK PRODUCTS AND RIGHTS THERETO. The following applies to any data, document, display, drawing, report, material, invention, work, and discovery, including any copyright, right, and interest therein or thereto and whether written, recorded, or electronically stored (collectively "**Work**") that District provides to Consultant pursuant to or relating this Agreement ("**District Work**") or that are provided to District by or on behalf of Consultant pursuant to or relating to this Agreement (collectively "**Consultant Work**"): (A) the District Work is District's property and District has all interests and rights thereto; (B) Consultant does not own and shall not claim any interest or right to or in the District Work; (C) District grants to Consultant a limited license during the Contract Term to use and reproduce only those portions of the District Work necessary for Consultant to perform this Agreement; (D) Consultant shall return any or all District Work to District upon District's request; (E) Consultant represents that the Consultant Work is Consultant's original work and does not contain any unlawful matter or infringe upon any third party's copyright, right, or interest; (F) the Consultant Work is an instrument of service and shall become District's sole property upon, and Consultant shall deliver to District the Consultant Work within 30 days of the date of completion of the Services or the date of termination of this Agreement, whichever is earlier; and (G) District shall have the right to, and may authorize others to, use, modify, duplicate, distribute, sell, dispose, and/or disclose, in whole or in part, in any manner, and for any purpose, the Consultant Work. District shall be the owner of all system performance data produced by each Energy Project's data acquisition system and have the right to, and may authorize others to, use, modify, duplicate, distribute, sell, dispose, and/or disclose, in whole or in part, in any manner, and for any purpose, the system performance data. Notwithstanding District's ownership of the performance data, Consultant shall have the right to retain copies of and use such performance data for its own purposes, including without limitation, using such data to improve Consultant's knowledge and performance of its services generally; however, in using such data, Consultant shall not in any way identify District as the owner or source of the data. The provisions of this Section shall survive the termination of this Agreement.

ARTICLE 2 COMPENSATION TO CONSULTANT.

SECTION 2.1 SERVICE FEE. As full consideration and compensation for Consultant's performance of the Services and this Agreement, District shall pay Consultant based on actual Services that Consultant performed in accordance with this Agreement, the total sum of which shall not exceed **\$22,297** and shall be billed based on the following rates: **Lump Sum Not To Exceed Upon CEC Approval of Energy**

Expenditure Plan. Except as stated in this Section 2.1, District shall have no obligation to pay any compensation or other consideration to Consultant for the Services, whether in contract, law, or equity.

SECTION 2.2 PAYMENT OF SERVICE FEE AND PAYMENT SCHEDULE.

2.2.1 **INVOICE AND DECLARATION UNDER PENALTY OF PERJURY.** Consultant shall submit an itemized invoice and supporting information to District before Consultant may receive any payment under this Agreement. Each person submitting and/or signing an invoice on behalf of Consultant declares under penalty of perjury under California laws, and certifies and attests that: (A) he/she has thoroughly reviewed the claim for payment and know its content; (B) the invoice and supporting information are truthful, accurate, and complete, and reflect Services that Consultant has completed in accordance with this Agreement and the correct amount for those Services; (C) Consultant has complied and is in compliance with all obligations required of Consultant under this Agreement; and (D) he/she is familiar with Penal Code section 72 pertaining to false claims, and knows and understands that submission and/or certification of a false claim may lead to fines, imprisonment, and/or other legal consequences. Upon receiving an invoice and if District objects to it and/or requires additional information, District shall notify Consultant and Consultant shall provide such information to District within 10 days after Consultant receives District's notice. If Consultant fails or refuses to provide the additional information, District shall have the right to withhold payment of any or all of the Service Fee until such time that District receives such information from Consultant

2.2.2 **CONDITIONS PRECEDENTS TO PAYMENT OF SERVICE FEE.** District is obligated to pay Consultant the Service Fee only upon the satisfaction of all of the following conditions and such each applicable condition stated in Section 2.2.3 below relating to each Service Fee Payment (collectively "**Service Fee Payment Conditions**"):

2.2.2.1 For each Energy Project that will be paid, in part or in whole, with funds by Proposition 39, the California Energy Commission ("**CEC**") has approved the energy expenditure plan that contains the Energy Project.

2.2.2.2 District has selected and entered into one or more contracts with the selected contractor(s)/installer(s) to install, construct, or implement the Energy Project.

2.2.2.3 The successful financing of the Energy Project and only when District has received development money from the financing. If an Energy Project will be paid with funds from Proposition 39, District must have received funds under Proposition 39 from the California Department of Education ("**CDE**") in an amount sufficient to cover the cost of the Energy Project unless District, in its sole discretion, approves use of funds from other sources to pay for the Energy Project.

2.2.2.4 CEC approved Consultant's Service Fee to be paid out of the funds that District receives from Proposition 39 and District received such funds from CDE.

2.2.2.5 On the date of payment of each Service Fee Payment, Consultant has performed all Services required, on or before such date, of Consultant.

If any of the Service Fee Payment Conditions is not satisfied, District is not obligated to pay Consultant, and Consultant shall have no rights to receive compensation of, the Service Fee or any other consideration for the Services that Consultant performed under this Agreement.

2.2.3 **PAYMENT SCHEDULE AND CONDITIONS.** After satisfaction of the Service Fee Payment Conditions set forth in Subsection 2.3.1, District shall pay the Service Fee to Consultant in accordance with the following:

2.2.3.1 **SERVICE FEE PAYMENT NO. 1:** 50% of the Service Fee within 30 days of the date on which District and each selected contractor/installer for the Energy Project(s) signed each contract to construct, install, and/or implement the Energy Project(s) and

District received funding from Proposition 39 in an amount sufficient to cover the costs of construction, installation, and/or implementation of the Energy Project(s).

- 2.2.3.2 SERVICE FEE PAYMENT NO. 2: 10% of the Service Fee within 30 days of the date of completion of the design documents for the Energy Project(s) and approval thereof by District and the appropriate government agency(ies).
- 2.2.3.3 SERVICE FEE PAYMENT NO. 3: 30% of the Service Fee within 30 days of the date the Energy Project(s) begin generating power or energy savings for District on a continuous and regular basis.
- 2.2.3.4 SERVICE FEE PAYMENT NO. 4: 10% of the Service Fee within 30 days of the date the Energy Project(s) are 100 percent completed, certification of the Energy Project(s) if the Energy Project(s) are subject to review and approval by DSA, and District's receipt of all warranties, as-builts, and operating manuals for and relating to the Energy Project(s).

ARTICLE 3 TERM AND TERMINATION OF AGREEMENT; SUSPENSION OF SERVICES.

SECTION 3.1 TERM. This Agreement is effective on June 09, 2016 (“**Effective Date**”) and continues in full force and effect thereafter until and including December 30, 2021 and any extension thereto (“**Contract Term**”) and, unless terminated during the Contract Term in accordance with Section 3.2, shall terminate at 12:00 midnight on the last day of the Contract Term without any notice or action by either Party. Any extension of the Contract Term shall be set forth in an amendment executed by the Parties.

SECTION 3.2 TERMINATION DURING CONTRACT TERM.

- 3.2.1 TERMINATION FOR CAUSE. During the Contract Term and unless specifically permitted otherwise in this Section 3.2, a Party may terminate this Agreement only upon the other Party's material breach of one or more provisions of this Agreement and after the non-breaching Party has given the breaching Party written notice at least 30 days before the date on which the termination is to become effective.
- 3.2.2 TERMINATION DUE TO CONSULTANT INSOLVENCY. Despite any contrary provisions in this Agreement, this Agreement shall terminate without any notice from District to Consultant effective the day immediately preceding the day on which: (A) there is a filing by or against Consultant to have Consultant adjudged bankrupt or there is a petition for reorganization or arrangement of Consultant under any law relating to bankruptcy; (B) Consultant applies for, consents to, or has an order, judgment, or decree entered by a court for approval of a petition for or appointment of a receiver, trustee, custodian, or liquidator of all or a substantial part of Consultant's assets; (C) Consultant is unable to, fails to, or admits in writing its inability generally to pay its debts or obligations as they become due; and/or (D) Consultant makes a general assignment for the benefit of creditors.
- 3.2.3 TERMINATION ON OTHER GROUNDS. Despite any contrary provisions in this Agreement, District may terminate this Agreement effective on the date stated in District's written notice of termination to Consultant pursuant to any of the following:
 - 3.2.3.1 District and/or any entity from which District receives or is to receive funds under Proposition 39 or other sources to pay for the Service Fee and/or the Energy Project(s) reduce or eliminate some or all such funds, or fail or determine not to appropriate sufficient funds to make future payments.
 - 3.2.3.2 A government or issuing agency revokes, suspends, places on probation, or non-renews any license, certification, and/or permit that Consultant must hold to perform its remaining material obligations under this Agreement and Consultant is not able to renew such license, certification and/or permit in a timely manner but in no event later than 30 days after the date of revocation, suspension, placement on probation, or non-renewal of the license, certification, and/or permit.

3.2.3.3 Consultant assigns, transfers, or subcontracts any or all of Consultant’s obligations and/or rights under this Agreement in breach of Section 7.3.

3.2.3.4 Consultant fails to maintain and provide written proof of insurance as required by Article 4 and fails to cure within 14 days of the date on which Consultant receives written notice to cure from District.

3.2.4 RIGHTS AND OBLIGATIONS UPON TERMINATION. Upon termination of this Agreement during the Contract Term, the provisions in this Subsection 3.2.4 shall survive the termination of this Agreement and govern District’s obligations to pay Consultant, and Consultant’s right to receive payment of, the Service Fee.

3.2.4.1 SERVICE FEE DUE.

Provision Pursuant to Which this Agreement Terminated	Service Fee Due to Consultant
Termination due to material breach of one or more provisions of this Agreement by Consultant pursuant to Subsection 3.2.1	\$0
Termination due to material breach of one or more provisions of this Agreement by District pursuant to Subsection 3.2.1	Each Service Fee Payment due to Consultant for Services Consultant performed in accordance with this Agreement before termination date prorating any payments where the termination date occurs between two Service Fee Payments
Termination pursuant to Subsection 3.2.2 (Consultant Insolvency)	\$0
Termination pursuant to Subsection 3.2.3.1 (lack or insufficient appropriation of funds)	Each Service Fee Payment due to Consultant for Services Consultant performed in accordance with this Agreement before termination date
Termination pursuant to Subsection 3.2.3.2 (revocation, suspension, nonrenewal of Consultant licenses/certifications)	\$0
Termination pursuant to Subsection 3.2.3.3 (assignment, transfer or subcontract by Consultant)	\$0
Termination Pursuant to Subsection 3.2.3.4 (Consultant failure to maintain and provide proof of required insurance)	\$0

3.2.4.2 All provisions in Subsections 2.2.1 and 2.2.2 shall apply to Consultant’s request for and District’s issuance of payment of the Service Fee under this Subsection 3.2.4, and, upon making each such payment, District is not obligated to pay and shall have no obligation to make any further payment to Consultant, whether pursuant to contract, law or equity.

SECTION 3.3 SUSPENSION OF SERVICES. Despite any contrary provision in this Agreement, District shall have the right to suspend, delay, or interrupt any or all Services at any time during the Contract Term by providing written notice to Consultant at least seven days before the date on which the suspension, delay, or interruption is to begin, and stating the beginning and ending dates thereof (“**Suspension Period**”). Unless the Parties agree otherwise in a written amendment executed by them,

the following shall apply upon District's exercise of the rights under this Subsection 3.3: (A) Consultant shall suspend, delay, or interrupt such Services as stated in Owner's notice but shall continue to perform all other Services; (B) Consultant shall not be entitled to any damages, losses, or costs arising out of, resulting from, or relating to Owner's exercise of its right under this Section or the Suspension Period; (C) Consultant shall resume performance of Services on the next business day following the ending date of the Suspension Period; and (D) the Contract Term shall remain the same.

SECTION 3.4 FORCE MAJEURE. A Party is not liable for failing to perform or delaying performance of this Agreement due to events that are beyond the Party's reasonable control and occurring without its fault or negligence, for example, acts of God such as tornadoes, lightning, earthquakes, hurricanes, floods, or other natural disasters (collectively "**Force Majeure**"), provided that the Party has promptly notified the other Party in writing of the occurrence of the Force Majeure, except that a Force Majeure shall not excuse District's payment to Consultant of any portion of the Service Fee that is due to Consultant where Consultant has performed, in accordance with this Agreement, the Services for which payment is requested, and submitted an invoice and supporting information as required on the Cover and Section 2.2. Consultant shall not receive any payment for Services that Consultant did not perform during the period in which the Force Majeure occurred.

ARTICLE 4 INSURANCE.

SECTION 4.1 REQUIRED INSURANCE. Consultant, at its cost, shall maintain in effect insurance that complies, at a minimum, with the applicable requirements stated below. District, in its sole discretion and through its Superintendent, may waive any requirement in this Subsection 4.1; however, District's failure to insist or request that Consultant comply with the requirements of this Section shall not constitute a waiver on District's part. District reserves the right to reject any insurance and/or to require that Consultant obtain insurance through an insurer satisfactory to District.

4.1.1 **COMMERCIAL GENERAL LIABILITY**, in effect throughout the Contract Term, coverage for property damage, bodily injury, and personal and advertising injury with limits of not less than \$1,000,000 per occurrence and \$2,000,000 general aggregate. This insurance shall contain a blanket additional insured endorsement or be endorsed to name Lemoore Union High School District and its governing board of trustees, officers, employees, and agents as an additional insured.

4.1.2 **WORKERS COMPENSATION**, in effect throughout the Contract Term, with limits of not less than \$1,000,000 or an amount as required by California laws, whichever is greater; and **EMPLOYER'S LIABILITY INSURANCE** of not less than \$1,000,000.

4.1.3 **COMMERCIAL AUTOMOBILE LIABILITY**, in effect throughout the Contract Term, covering, at a minimum, non-owned and hired autos and, if there are any autos owned by Consultant, then also covering owned autos, with a combined single limit of not less than \$1,000,000 per accident.

SECTION 4.2 PROOF AND NOTICE; DEDUCTIBLE OR SELF-INSURED RETENTION. Consultant shall provide to District: (A) as required on the Cover and from time to time as District may request, written proof satisfactory to District of the existence of the insurance required of Consultant, including any required endorsement; (B) upon District's request, a certified copy of the insurance policy or other document satisfactory to District; (C) no later than 15 days before the date on which a required insurance expires, written proof of renewal of the insurance, including any required endorsement; and (D) written notice within two business days of the occurrence of any of the following: (1) any required insurance is cancelled or non-renewed, (2) notice from the insurer that the insurer intends to or will cancel or non-renew the insurance, and/or limit, restrict, or reduce Consultant's insurance coverage such that the insurance does not comply with the requirements in Section 4.1, or (3) any required insurance's policy limits have been reduced below those required in Section 4.1. Consultant shall disclose any deductible or self-insured retention for any of the required insurance. District reserves the right to require that such deductible or self-insured retention be eliminated or reduced, that Consultant obtain a bond or other security guaranteeing payment of losses and costs within the limits of the deductible or self-insured retention, or that Consultant provide other assurances satisfactory to District. Consultant's obligation to

provide written proof of the insurance required under Section 4.1 shall survive the termination of this Agreement.

ARTICLE 5 INDEMNITY.

Each Party's indemnity, defense, and hold harmless obligations to the other Party under or related to this Agreement shall be governed solely by this Article. A Party ("**Indemnitor**") shall: (A) indemnify and hold harmless the other Party ("**Indemnitee**") to the full extent permitted by California laws for any Loss sustained by Indemnitee or a Third Party only in proportion to Indemnitor's liability based on a Final Determination; and (B) defend and pay for all of Indemnitor's attorney's fees and litigation costs related to any Claim or Loss without any right against or from the Indemnitee for indemnity and/or hold harmless of such costs and fees, or any right for defense. A Party who intends to seek or seeks indemnity and/or hold harmless for any Loss from the other Party: (A) shall notify the other Party in writing and within a reasonable time after the Party knows or becomes aware of any Claim that may or will result in a Loss, describing, if known or determinable, the pertinent circumstances, all entities and persons involved, and the amount being claimed; and (B) shall not settle or resolve the Claim until it has notified the other Party of the Claim in accordance with the preceding provision and given the other Party written notice and an opportunity to participate in and to consent to the settlement or resolution of the Claim, which consent the other Party shall not unreasonably withhold. A Party's obligations under this Article are not limited to or by any insurance that it maintains or the lack of insurance but apply to the full extent permitted by California laws, and shall survive the termination of this Agreement. "**Claim**" means any claim, demand, lawsuit, cause of action, action, cross-complaint, cross-action, and/or proceeding arising out of, resulting from, or relating to this Agreement where there has been no Final Determination. "**Loss**" means any bodily injury, property damage, personal injury, advertising injury, liability, loss, damage, judgment, expense, and/or cost (excluding attorney's fees and litigation costs that a Party or a Third Party incurred or paid related to a Loss or Claim) arising out of, resulting from, or relating to this Agreement and for which there has been a Final Determination that a Party is or both Parties are liable. "**Third Party**" means a person who or an entity that is *not* any of the following: (A) a Party; (B) an owner, director, officer, employee, or agent of Consultant; (C) an officer, employee, or agent of District; or (D) contracted with (whether directly or through a subcontract of any level) or otherwise retained by a Party to act for or on the Party's behalf. "**Final Determination**" means any judgment, order, or decision, each a "**Determination**," by a court of competent jurisdiction or a governmental entity with jurisdiction to render the Determination where the Determination is not subject to appeal or the period for an appeal has expired.

ARTICLE 6 DISPUTE RESOLUTION.

The Parties shall meet and confer in good faith to resolve any dispute between them arising out of, resulting from, or relating to this Agreement, including any Claim or Loss for which a Party seeks indemnity pursuant to Article 5 and any dispute relating to this Agreement that arises or occurs after the termination of this Agreement. During any dispute, District's decision, for the time being, shall prevail and Consultant shall perform this Agreement as District directs without prejudice to a Final Determination, as this term is defined in Article 5. During a dispute regarding payment under this Agreement, District shall pay Consultant the amount that is undisputed and due to Consultant; if a disputed amount is determined in a Final Determination to be due to Consultant, District shall pay such amount to Consultant within 30 days of the date of the Final Determination, unless a different date is stated in the Final Determination or in an agreement executed by the Parties, in which case, District shall pay Consultant in accordance therewith. Except for an action to preserve the status quo and/or prevent irreparable harm, a Party shall not commence any cause of action, action, lawsuit, or proceeding arising out of, resulting from, or relating to this Agreement until after the Party has complied with the provisions of this Article. The provisions of this Article shall survive the termination of this Agreement.

ARTICLE 7 GENERAL PROVISIONS.

SECTION 7.1 ENTIRE AGREEMENT, EXECUTION, AMENDMENT, AND WAIVER. This Agreement is a complete and exclusive statement of the Parties' agreement under Code of Civil Procedure section 1856. The Parties may execute this Agreement and any amendment in counterparts such that each Party's signature is on a separate page. A copy or an original of this Agreement or an amendment with the Parties' signatures, whether original or transmitted by electronic means, shall be deemed a fully

executed contract. The Parties may amend or waive any provision of this Agreement only by a writing executed by them.

SECTION 7.2 INTERPRETATION; APPLICABLE LAWS AND TIME ZONE; VENUE; SEVERABILITY; AND SURVIVAL OF TERMINATION. If there is uncertainty of any language in this Agreement, the Parties agree that Civil Code section 1654 shall not apply to interpret the uncertainty. The language of this Agreement shall be interpreted according to its fair meaning and not strictly for or against any Party and under California laws without giving effect to California's choice of law provisions that may result in the application of the laws of another jurisdiction. All dates and times stated in this Agreement shall be according to Pacific Time. All causes of action, actions, lawsuits, and proceedings arising out of, resulting from, or relating to this Agreement shall be adjudicated in state or federal court in Fresno County, California, provided that District does not hereby waive any immunity to suit. If a court of competent jurisdiction holds any provision of this Agreement void, illegal, or unenforceable, this Agreement shall remain in full force and effect and shall be interpreted as though such invalidated provision is not a part of this Agreement and the remaining provisions shall be construed to preserve the Parties' intent in this Agreement. Any provision in this Agreement that by its nature applies after, or is specifically stated to survive, the termination of this Agreement shall survive the termination of this Agreement.

SECTION 7.3 INDEPENDENT CONTRACTOR, ASSIGNMENT, TRANSFER, AND SUBCONTRACT. Consultant is an independent contractor, and it and its officers, employees, and agents are not, and shall not represent themselves as, officers, employees, or agents of District. This Agreement does not and shall not be construed to create an employment or agency relationship, partnership, or joint venture between the Parties. Consultant and its officers, employees, agents, and any other person performing services for or on behalf of Consultant shall not have any right or claim against District for wages or employee compensation, social security benefits, workers compensation benefits, health benefits, vacation, sick leave, or other employee benefits. Consultant shall not assign, transfer, or subcontract any or all of its obligations and/or rights under this Agreement, including by operation of law or change of control or merger, without District's prior written consent.

SECTION 7.4 NOTICES. Except as may be stated otherwise in this Agreement in which case such provision shall govern to the extent provided therein, each Party shall give any notices, demands, and all other communications required or permitted under this Agreement in writing and by one of the following methods to the other Party at its address and/or email stated on page 1 of this Agreement, delivery to be effective upon receipt thereof by the other Party: (A) hand delivery; (B) sent by a reputable overnight courier service that tracks the delivery; (C) sent by certified mail, return receipt requested, postage prepaid; or (D) sent by regular mail *and* transmitted by e-mail. A Party may change its contact person and/or contact information stated on the Cover by notifying the other Party of the particular change and the effective date thereof in accordance with this Section. The provisions of this Section shall survive the termination of this Agreement.

SECTION 8.5 CONFLICTS OF INTEREST. During the Contract Term, neither Consultant nor its members, employees or agents shall have a financial interest in any Energy Project other than Consultant's rights under this Agreement. District acknowledges that Consultant may have previously had or may currently have agreements or a business relationship with or received compensation from other parties to the Energy Project and Consultant may enter into agreements or business relationships or receive compensation from such third parties in the future, provided that (A) such agreements, relationships or compensation are not related to or contingent upon District or any Energy Project; and (B) Consultant does not and will not have any financial interest in any Energy Project other than Consultant's rights under this Agreement.

In consideration of the covenants, conditions, and promises in and for good and valuable consideration and the mutual benefits to be derived from this Agreement, Consultant and District have reviewed and understand and hereby enter into this Agreement. Each person executing this Agreement on behalf of a Party represents that he/she is authorized to execute on behalf of and to bind the Party to this Agreement.

CONSULTANT

DISTRICT

By: _____

By: _____

Print Name: Stan Butts

Debbie Muro, Superintendent

Title: Vice President

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