

CONTRACT FOR

ROAD MAINTENANCE AND OPERATION

THIS CONTRACT (hereinafter "Agreement") is made and entered into this _____ day of _____, 20____, by and between The CITY OF DANA POINT, a municipal corporation, hereinafter designated as "CITY" and The COUNTY OF ORANGE, a political subdivision of the State of California, hereinafter referred to as "COUNTY" ~~which may be referred individually as "Party" or collectively as "Parties"~~. **with City and County sometimes individually referred to as "Party" or collectively referred to as "Parties"**.

RECITALS

WHEREAS, CITY and COUNTY entered into contract number ~~D02-135~~ **D14-003** for COUNTY to provide certain road maintenance and operation functions for the public streets located within the CITY limits for the term of July 1, ~~2003~~ **2009** through and including June 30, ~~2005~~ **2014**; it was mutually agreed that this agreement may be extended for two (2) additional terms of five (5) years each, the first one to commence July 1, 2014, and the second one to commence July 1, 2019.

~~WHEREAS, CITY desires COUNTY to continue to provide those services;~~ **WHEREAS, the CITY notified the COUNTY in writing after July 1, 2013, that they desire to extend the contract.**

WHEREAS, COUNTY is willing to continue to perform certain road maintenance and operation functions for those public streets located within the CITY plus any new public streets accepted by CITY and accept payment from CITY for the cost of those services; and

WHEREAS, the Parties are desirous of entering into an agreement to continue services and supersede agreement number ~~D02-135~~ **D09-001**.

NOW, THEREFORE, the Parties mutually agree as follows:

~~AGREEMENT~~ **ARTICLES**

NOW, THEREFORE, CITY and COUNTY, the Parties mutually agree as follows:

A. DEFINITIONS

1 1. Work Plan: For the purposes of this Agreement, the term Work Plan shall mean ~~that~~ **the**
 2 **City's** annual fiscal year's Work Plan and budget developed by October 1 of the preceding year, which is
 3 hereby attached as Exhibit A.

4 2. Force Account: For the purposes of this Agreement, the term Force Account shall mean in
 5 house County labor resources

6 B. TERM

7 That the term of this Agreement shall be for five (5) years commencing on July 1, ~~2009~~ **2014**
 8 , through and including June 30, ~~2014~~ **2019** with an option for ~~two (2)~~ **one (1)** five (5) year extensions
 9 upon mutual agreement by both parties, unless otherwise terminated by either Party as provided in
 10 paragraph C. In the event that COUNTY or CITY desires to renew or extend this Agreement past the
 11 initial 5-year term ending on June 30, ~~2014~~ **2019**, that Party shall notify the other Party in writing by July 1,
 12 ~~2013~~ **2018**.

13 C. TERMINATION

14 Either Party may at any time, for any reason, with or without cause terminate this Agreement, or
 15 any portion, by serving upon the non-terminating Party a written Notice of Termination at least six (6)
 16 months prior to the date of termination. The terminating Party shall not be obligated to explain its reasons
 17 for termination. ~~Upon receipt of said notice, the non-terminating Party shall immediately cease all~~
 18 ~~work under this Agreement, unless the notice provides otherwise.~~ If the terminating Party terminates
 19 a portion of this Agreement, such termination shall not make void or invalidate the remainder of this
 20 Agreement.

21 D. COMPENSATION:

22 1. CITY agrees that the total for all **non-emergency** work performed under this Agreement
 23 shall not exceed ~~\$1,200,000~~ **\$1,101,341** for the first fiscal year ~~2009-010~~ **2014-15**. Total cost for each
 24 subsequent fiscal year after ~~2009-010~~ **2014-15** shall not increase or decrease by more than 10% of the
 25 preceding year without mutual consent of the Parties as set forth in a written amendment to this
 26 Agreement. However, in the event the COUNTY provides emergency road maintenance necessitated by
 accidents, storms or other weather conditions or CITY requests additional services on a time and

1 materials basis, COUNTY shall be compensated by CITY for the work at the prices, rates and fees set
2 forth in the annual Work Plan regardless of total cost. The COUNTY may provide services to the CITY
3 beyond the level of the annual Work Plan based on a request from the CITY and the availability of
4 COUNTY work force or contract capability.

5 2. The CITY may reduce or revise level of force account services provided under this
6 agreement during the year to not less than 75% of the projected force account portion of Exhibit A to
7 accommodate changes in the CITY budget and may utilize alternative source or sources for services
8 beyond the level of service in the projected plan. Projected contract work, including the special pavement
9 maintenance shall be included in the Work Program and Budget.

10 **E. INDEMNIFICATION**

11 COUNTY agrees to indemnify, defend with counsel approved in writing, protect and hold harmless
12 the CITY, its officers, elected or appointed officials, employees and volunteers from and against any and
13 all claims, demands, losses, defense costs or expenses, or liability of any kind or nature which the CITY,
14 its officers, elected or appointed officials, employees and volunteers may sustain or incur or which may be
15 imposed upon them for injury to or death of persons or damage to property arising out of COUNTY's
16 negligent or wrongful acts or omissions in performing under the terms of this Agreement. COUNTY shall
17 defend, at its expense, including attorney fees, CITY, its officers, agents, employees, independent
18 contractors and volunteers in any legal action or claim of any kind based upon such alleged acts or
19 omissions. The COUNTY shall not be liable in any way or indemnify the CITY for CITY's negligence or
20 the negligence of CITY's officers, officials, employees or volunteers.

21 COUNTY agrees that it will follow its work management system field manual and the CalTrans
22 manual of traffic controls for construction and maintenance work zones to avoid or minimize risk of loss.

23 CITY agrees to indemnify, defend with counsel approved in writing, protect and hold harmless the
24 COUNTY, its officers, elected or appointed officials, employees and volunteers from and against any and
25 all claims, demands, losses, defense cost or expenses, or liability of any kind or nature which the
26 COUNTY, its officers, elected or appointed officials, employees or volunteers may sustain or incur or
which may be imposed upon them for injury to or death of persons or damage to property arising out of the

1 CITY's negligent or wrongful acts or omission in performing under the terms of this Agreement. The CITY
2 shall not be liable in any way or indemnify the COUNTY for COUNTY's negligence or the negligence of
3 COUNTY's officers, elected or appointed officials, employees or volunteers.

4 If judgment is entered against CITY and COUNTY by a court of competent jurisdiction because of
5 the concurrent active negligence of CITY OR COUNTY, CITY and COUNTY agree that liability will be
6 apportioned as determined by the court. Neither party shall request a jury apportionment.

7 Without limiting the foregoing, CITY indemnification also extends to COUNTY employees or agents
8 serving as inspectors in the CITY whose duties include recurring inspection to identify maintenance and
9 repair needs. The failure to identify a hazard not currently involved in maintenance or repair which results
10 in claim shall not transfer responsibility for the hazard to the COUNTY. COUNTY responsibility includes
11 maintenance and repair work in progress by COUNTY employees or contract work under COUNTY
12 administration.

13 Each Party agrees to fully cooperate with the other and assist the other Party hereto in all matters
14 relating to losses covered by the terms of this Agreement, and more specifically but not being limited
15 thereby, each Party will:

16 1. Give prompt notification of all occurrences covered or likely to be covered by the terms
17 hereof, together with the particulars thereof the other part hereto;

18 2. If claim is made, or suit is brought against a Party on occurrences covered or likely to be
19 covered by the terms hereof, such party shall immediately forward every claim, demand, notice, summons
20 or other process received by it to the other Party hereto.

21 CITY may, at its own expense, participate in the defense of any suit, or in the prosecution of any
22 appeal affecting matters herein involved where the duty of defense or prosecution is imposed on
23 COUNTY, and where COUNTY has consented thereto.

24 **F. NOTICES**

25 Any and all notices permitted or required to be given hereunder shall be deemed duly given 1)
26 upon actual delivery, if delivery is by hand; or 2) upon delivery by the United States Mail if delivery is by

1 postage paid registered or certified return receipt requested mail. Each such notice shall be sent to the
2 respective Party at the address indicated below;

3 FOR CITY: City Manager
4 33282 Golden Lantern
5 Dana Point, CA 92629

6 FOR COUNTY: City Contract Manager
7 2301 N. Glassell Street
8 Orange, CA 92865

9 **G. PROJECT MANAGER**

10 The CITY shall appoint a Project Manager to act as liaison between the COUNTY and CITY during
11 the term of this Agreement. The CITY's Project Manager shall coordinate the activities of the CITY staff
12 assigned to work with COUNTY. COUNTY shall appoint a Contract Administrator. COUNTY's Contract
13 Administrator shall direct the COUNTY's efforts in fulfilling COUNTY's obligations under this Agreement.

14 **H. ENTIRE AGREEMENT**

15 This Agreement along with each fiscal year's annual Work Plan contains the entire contract
16 between the Parties with respect to the matters contained herein.

17 **I. GOVERNING LAW AND VENUE**

18 The CITY and COUNTY understand and agree that the laws of the State of California shall govern
19 the rights, obligations, duties and liabilities of the Parties to this Agreement and also govern the
20 interpretation of this Agreement. In the event of any legal action to enforce or interpret this Agreement,
21 the sole and exclusive venue shall be a court of competent jurisdiction located in Orange County,
22 California, and the Parties hereto agree to and hereby submit to the jurisdiction of such court,
23 notwithstanding Code of Civil Procedure Section 394. Furthermore, the Parties specifically agree to waive
24 any and all rights to request that an action be transferred for trial to another County.

25 **J. AMENDMENTS**

26 No alteration or variation of the terms of this Agreement shall be valid unless made in writing and

1 signed by the Parties, no oral understanding or agreement not incorporated herein shall be binding on
2 either of the Parties, and no exceptions, alternatives, substitutes or revisions are valid or bind on the
3 COUNTY unless authorized by COUNTY in writing.

4 **K. ASSIGNMENT**

5 Neither Party shall assign its performance of this Agreement, nor any part thereof, without the prior
6 written consent of the non-assigning Party. Any attempt by either Party to assign this Agreement or any
7 portion thereof without the express written consent of the non-assigning Party shall be invalid and
8 constitute a breach of this Agreement.

9 **L. CONSENT TO BREACH NOT WAIVER**

10 No term or provision of this Agreement shall be deemed waived and no breach excused, unless
11 such a waiver or consent shall be in writing and signed by the Party claimed to have waived or consented.
12 Any consent by any Party to, or waiver of, a breach by the other, whether express or implied, shall not
13 constitute consent to, waiver of, or excuse for any other different or subsequent breach.

14 **M. FORCE MAJEURE**

15 COUNTY shall not be assessed with damages or penalties for unsatisfactory performance during
16 any delay in the performance of any work under this Agreement caused by any act of God, war, civil
17 disorder, employment strike or other cause beyond its reasonable control, provided COUNTY gives written
18 notice of the cause of the delay to the CITY within 24 hours of the start for the delay. Dedicated City crew
19 provided through this Agreement and as defined in the Work Plan and Budget shall remain assigned to the
20 City throughout any such event or situation.

21 **N. HEADINGS**

22 The various heading and numbers herein, the grouping of provisions of this Agreement into
23 separate clauses and paragraphs, and the organization hereof are for the purpose of convenience only
24 and shall not limit or otherwise effect the meaning hereof.

25 **O. CALENDAR DAYS**

26 Any reference to the word "day" or "days" shall mean calendar day or calendar days respectively,

1 unless otherwise expressly provided.

2 **P. ATTORNEY FEES**

3 In any action or proceeding to enforce or interpret any provision of this Agreement or where any
4 provisions hereof is validly asserted as a defense, each Party shall bear its own attorney's fees, costs and
5 expenses.

6 **Q. INTERPRETATION**

7 This Agreement has been negotiated at arm's length and between persons sophisticated and
8 knowledgeable in the matters dealt with in this Agreement. In addition, each Party has been represented
9 by experienced and knowledgeable independent legal counsel of their own choosing or has knowingly
10 declined to seek such counsel despite being encouraged and given the opportunity to do so. Each Party
11 further acknowledges that they have not been influenced to any extent whatsoever in executing this
12 Agreement by any other Party hereto or by any person representing them, or both. Accordingly, any rule
13 of law, (including California Civil Code section 1654) or legal decision that would require interpretation of
14 any ambiguities in this Agreement against the Party that drafted it is not applicable and it deemed waived.
15 The provisions of this Agreement shall be interpreted in a reasonable manner to affect the purpose of the
16 Parties to this Agreement.

17 **R. SEVERABILITY**

18 If any term, **covenant**, condition, provision or article of this Agreement is held by a court of
19 competent jurisdiction to be invalid, void or unenforceable, the remainder of the provisions hereof shall
20 remain in full force and effect and shall in no way be affected, impaired or invalidated thereby.

21 **S. DISPUTE**

22 If a dispute arises, the Parties' respective designated representatives shall attempt to resolve the
23 issue. In the event the City Contracts Manager and the City's Project Manager have failed to resolve the
24 issue within twenty working days after the referral of the issue to them, the Parties shall refer the issue to
25 the City Engineer/Director of Public Works and OC Public Works (OCPW) Operations Manager for
26 resolution.

T. AUTHORITY TO EXECUTE THIS AGREEMENT

The Parties to this Agreement represent and warrant that this Agreement has been duly authorized and executed and constitutes the legally binding obligation of their respective organization or entity, enforceable in accordance with its terms.

CITY AND COUNTY RESPONSIBILITIES:

U. COUNTY SHALL:

1. Each fiscal year develop an annual Work Plan for labor, equipment, materials and contracts for CITY to provide normal maintenance and operation activities utilizing COUNTY's Maintenance Management System (MMS).

2. Develop a preliminary annual Work Plan to provide field operations, contract effort and support operations required to provide the level of maintenance requested by the CITY and within the "not to exceed" amount established by this Agreement. The preliminary Work Plan will include estimates for manpower and equipment. This Work Plan will be based on the historical maintenance workload in the CITY, discussions with CITY staff of future priority and emphasis and changes in the composition of the COUNTY work force and contract capability. COUNTY shall submit the preliminary annual Work Plan to CITY for review by August 1 of each year for the next fiscal year scheduled to begin July 1. The annual Work Plan shall be finalized by October 1, consistent with CITY recommendations and available resources. The Work Plan shall include an allowance for miscellaneous work to respond to emergencies. The final annual Work Plan for each fiscal year shall be incorporated into and attached as part of this Agreement as Exhibit A.

3. Perform road maintenance and operation functions in general accordance with the annual Work Plan but based upon specific inspection reports of required maintenance activities, requests from CITY staff for specific work and the established schedule of cyclical maintenance activities. Road maintenance activities may be performed by COUNTY either by force account or contract, or a combination of the two.

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1 4. Perform emergency or special road maintenance and operation functions necessitated by
2 accidents, storms or other weather conditions, slides, settlements, or other unusual or unexpected
3 damage to a roadway, structure, or facility.

4 5. Be and is hereby designated as project engineer, contract and construction agent to do and
5 perform all things necessary in order to design and accomplish road maintenance tasks by contract.

6 6. Prepare general and specific work schedules. General schedule shall indicate work to be
7 accomplished by contract and work to be accomplished by force account. Provide copy of specific work
8 schedule for COUNTY force account work to CITY on a biweekly basis and shall include within the two-
9 week schedule the CITY service requests.

10 7. Submit monthly progress updates to the CITY in the form of activity status reports, contract
11 status and backlog reports. Meet periodically with CITY to discuss the annual Work Plan and services
12 being provided. Notify CITY in advance of cost overruns associated with deviations from the Work Plan
13 and work with CITY to implement strategies for budget and/or service level adjustments commensurate
14 with available funding.

15 8. Submit to CITY Maintenance Inspection Reports of identified work including activities not
16 covered by the annual Work Plan or that would exceed levels set forth in the plan to CITY. Work
17 exceeding the annual Work Plan will be the subject of separate discussion regarding funding, scheduling
18 and accomplishment.

19 9. Provide support operations required for providing normal maintenance operations in
20 accordance with the annual Work Plan. This includes the following operations and functions:

21 a. Provide inspection of road facilities within CITY, preparation of standard
22 Maintenance Inspection Reports (MIR) to initiate maintenance work, investigation of complaints from the
23 public and CITY representatives and routine investigation of the Public Works maintenance aspects of
24 claims made against the CITY.

25 b. Provide scheduling services for preparation of work assignments based upon
26 inspection reports and/or input from CITY in accordance with the annual Work Plan. Develop and

1 maintain a backlog report for activities for the CITY area to track work performed, and prepare reports of
2 project costs for those projects where special reimbursement is possible.

3 c. Provide all routine service, supplies and logistical support for performance of
4 maintenance and operations functions for COUNTY crews in accordance with its standard warehouse
5 operating procedures.

6 d. Provide contract administration/inspection services for maintenance work performed
7 by contract in CITY at COUNTY direction.

8 e. Provide logistical support COUNTY crews including contract administration of
9 specialty contractors, support contracts, special materials and services.

10 10. Include CITY requested special road maintenance work (i.e., slurry seal or overlay – with
11 associated subgrade repairs/surface preparation work) in formally bid COUNTY contracts for slurry seal
12 and A/C overlay work on County-owned roads and streets. This includes the following:

13 a. Provide contract design, preparation and administration inspection service.

14 b. Submit plans and specifications for contract work to CITY for review and approval
15 by the CITY engineer or designee, hereinafter referred to as “CITY ENGINEER”, for contracts with CITY
16 portion estimated to exceed \$10,000. Plans and specifications are submitted for approval of design and
17 construction features.

18 c. During the period of construction, have jurisdiction over the construction area.

19 d. Obtain the written concurrence of CITY ENGINEER prior to issuing contract change
20 orders affecting contract design.

21 e. Request the CITY participate in the final inspection of contract work;
22 consider the CITY comments on the quality and quantity of contract work prior to COUNTY filing the
23 Notice of Completion.

24 f. Furnish and deliver to CITY, if requested, all documents required in connection with
25 the construction and completion of the contract.

26 11. Provide all supervision and management required for the annual Work Plan

1 12. For the fiscal year July 1, ~~2009~~ 2014 through June 30, ~~2010~~ 2015, perform all of the work
2 as requested by CITY listed on annual Work Plan for the ~~2009-10~~ 2014-15 fiscal year. The Work Plan is a
3 schedule of specific activities for street maintenance and repair that the CITY intends to have
4 accomplished during fiscal year on which is stated the quantities of particular activities that are required to
5 accomplish the road maintenance and repair. Each fiscal year's annual Work Plan shall have the prices,
6 rates and fees set forth charges incurred by the CITY during that fiscal year based upon the projected
7 material, labor, burden, overhead, equipment and contracted services for the upcoming fiscal year. In
8 addition to the prices, rates and fees set forth in the annual Work Plan, the COUNTY shall charge CITY an
9 additional four (4) percent of all billed costs for Risk Management Services. The COUNTY is self insured.
10 Therefore this additional cost will cover liability issues arising from any claims pursuant to terms listed in
11 section E of this Agreement. In addition, COUNTY shall prepare a report, subject to review and approval
12 of the CITY's Streets Manager, which describes each of the activities listed on the annual Work Plan.

13 **V. CITY SHALL:**

- 14 1. Review service levels contained within County's preliminary annual Work Plan, and make
15 adjustments by October 1, based upon CITY's budget and desired service levels and consistent with
16 available COUNTY resources and contract capability.
- 17 2. Meet periodically with COUNTY to discuss the annual Work Plan and services being
18 provided. Review with COUNTY cost overruns associated with deviations from the Work Plan and
19 develop strategies for budget and/or service levels commensurate with available funding.
- 20 3. Notify COUNTY of priority service requests to be included within the following two-week
21 work schedule. Review work schedule for force account and contract work.
- 22 4. Designate an individual or individuals authorized to submit service and designate that the
23 individual or individuals authorized to review and approve contract documents as the CITY ENGINEER.
- 24 5. Pay COUNTY for entire total cost incurred by COUNTY for maintenance, operation, support
25 and contract functions performed within CITY by COUNTY staff or COUNTY administered contract to
26 include all costs for labor, equipment, materials, service contracts, special maintenance contracts, repair

1 contracts, and all applicable overhead and supervisory expenses in accordance with established COUNTY
2 prices, rates, fees and charges at the time work is performed.

3 6. Pay COUNTY invoiced costs by payment due date. Payment due dates are invoice date
4 plus thirty days.

5 7. Pay late charges for invoices not paid within thirty (30) days after receipt in accordance with
6 the following schedule:

7 a. Over-the-counter payments will be assessed a late charge if any payment is not
8 received by the COUNTY by the payment due date.

9 b. Payments transmitted to the COUNTY via the U.S. Mail that have payer's postage
10 meter mark will be assessed a late charge if any payment is not received by the COUNTY by the payment
11 due date plus one day.

12 c. Payments transmitted to the COUNTY via the U.S. Mail that have a U.S. Post Office
13 postmark dated after the payment due date will be assessed a late charge.

14 d. The late charge assessed in each of these situations shall be three-quarters of one
15 percent (0.75%) of the payment due and unpaid plus \$100.00 for late payments made within thirty (30)
16 days of the payment due date. An additional charge of three-quarters of one percent (0.75%) of said
17 payment shall be added for each additional thirty (30) day period that the payment remains unpaid. Late
18 charges shall be added to the payment and invoiced to the contracting entity.

19 8. Serve as liaison with individual homeowners, homeowner association's citizen groups and
20 other concerning performance of work and levels of service provided under this Agreement.

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1 IN WITNESS WHEREOF, CITY has caused this Agreement to be executed by its City Manager
 2 and attested by its Clerk, and COUNTY has caused this contract Agreement to be executed by the
 3 Chairman of its Board of Supervisors and attested by its Clerk, all thereunto duly authorized by the CITY
 4 Council and the Board of Supervisors, respectfully.

6 COUNTY OF ORANGE

CITY OF DANA POINT

8 By _____
 9 Chairman of the Board of Supervisors

_____ City Manager

10 Date: _____

Date: _____

11 SIGNED AND CERTIFIED THAT A COPY OF
 12 THIS AGREEMENT HAS BEEN DELIVERED TO
 13 THE CHAIR OF THE BOARD

Attest:

14 By _____
 15 ~~DARLENE J. BLOOM~~ Susan Novak
 16 Clerk of the Board of Supervisors of
 17 Orange County, California

_____ CITY Clerk

18 Date: _____

Date: _____

19 APPROVED AS TO FORM
 20 OFFICE OF THE COUNTY COUNSEL
 21 ORANGE COUNTY, CALIFORNIA

Approved As to Form:

22 By _____
 23 Deputy

_____ CITY Attorney

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