

**CITY OF COSTA MESA  
PROFESSIONAL SERVICES AGREEMENT  
WITH FUSCOE ENGINEERING, INC.**

THIS PROFESSIONAL SERVICES AGREEMENT ("Agreement") is made and entered into this 17<sup>th</sup> day of September 2024 ("Effective Date"), by and between the CITY OF COSTA MESA, a municipal corporation ("City"), and FUSCOE ENGINEERING, INC. a California Corporation ("Consultant").

**RECITALS**

A. City proposes to utilize the services of Consultant as an independent contractor to provide professional Design and Construction services to improve proper drainage for the TeWinkle Park Baseball Fields, as more fully described herein; and

B. Consultant represents that it has that degree of specialized expertise contemplated within California Government Code section 37103, and holds all necessary licenses to practice and perform the services herein contemplated; and

C. City and Consultant desire to contract for the specific services described in Exhibit "A" and desire to set forth their rights, duties and liabilities in connection with the services to be performed; and

D. No official or employee of City has a financial interest, within the provisions of sections 1090-1092 of the California Government Code, in the subject matter of this Agreement.

NOW, THEREFORE, for and in consideration of the mutual covenants and conditions contained herein, the parties hereby agree as follows:

**1.0. SERVICES PROVIDED BY CONSULTANT**

1.1. Scope of Services. Consultant shall provide the professional services described in Consultant's Proposal, attached hereto as Exhibit "A," both incorporated herein.

1.2. Professional Practices. All professional services to be provided by Consultant pursuant to this Agreement shall be provided by personnel experienced in their respective fields and in a manner consistent with the standards of care, diligence and skill ordinarily exercised by professional consultants in similar fields and circumstances in accordance with sound professional practices. Consultant also warrants that it is familiar with all laws that may affect its performance of this Agreement and shall advise City of any changes in any laws that may affect Consultant's performance of this Agreement.

1.3. Performance to Satisfaction of City. Consultant agrees to perform all the work to the complete satisfaction of the City. Evaluations of the work will be done by the City Manager or his or her designee. If the quality of work is not satisfactory, City in its discretion has the right to:

- (a) Meet with Consultant to review the quality of the work and resolve the matters of concern;

- (b) Require Consultant to repeat the work at no additional fee until it is satisfactory; and/or
- (c) Terminate the Agreement as hereinafter set forth.

1.4. Warranty. Consultant warrants that it shall perform the services required by this Agreement in compliance with all applicable Federal and California employment laws, including, but not limited to, those laws related to minimum hours and wages; occupational health and safety; fair employment and employment practices; workers' compensation insurance and safety in employment; and all other Federal, State and local laws and ordinances applicable to the services required under this Agreement. Consultant shall indemnify and hold harmless City from and against all claims, demands, payments, suits, actions, proceedings, and judgments of every nature and description including attorneys' fees and costs, presented, brought, or recovered against City for, or on account of any liability under any of the above-mentioned laws, which may be incurred by reason of Consultant's performance under this Agreement.

1.5. Non-Discrimination. In performing this Agreement, Consultant shall not engage in, nor permit its agents to engage in, discrimination in employment of persons because of their race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military or veteran status, except as permitted pursuant to section 12940 of the Government Code.

1.6. Non-Exclusive Agreement. Consultant acknowledges that City may enter into agreements with other consultants for services similar to the services that are subject to this Agreement or may have its own employees perform services similar to those services contemplated by this Agreement.

1.7. Delegation and Assignment. This is a personal service contract, and the duties set forth herein shall not be delegated or assigned to any person or entity without the prior written consent of City. Consultant may engage a subcontractor(s) as permitted by law and may employ other personnel to perform services contemplated by this Agreement at Consultant's sole cost and expense.

1.8. Confidentiality. Employees of Consultant in the course of their duties may have access to financial, accounting, statistical, and personnel data of private individuals and employees of City. Consultant covenants that all data, documents, discussion, or other information developed or received by Consultant or provided for performance of this Agreement are deemed confidential and shall not be disclosed by Consultant without written authorization by City. City shall grant such authorization if disclosure is required by law. All City data shall be returned to City upon the termination of this Agreement. Consultant's covenant under this Section shall survive the termination of this Agreement.

## **2.0. COMPENSATION AND BILLING**

2.1. Compensation. Consultant shall be paid in accordance with the fee schedule set forth in Exhibit "A," attached hereto and made a part of this Agreement. Consultant's total compensation shall not exceed Twenty-Five Thousand Dollars (\$25,000.00).

2.2. Additional Services. Consultant shall not receive compensation for any services

provided outside the scope of services specified in the Consultant's Proposal unless the City Manager or designee, prior to Consultant performing the additional services, approves such additional services in writing. It is specifically understood that oral requests and/or approvals of such additional services or additional compensation shall be barred and are unenforceable.

2.3. Method of Billing. Consultant may submit invoices to the City for approval on a progress basis, but no more often than two times a month. Said invoice shall be based on the total of all Consultant's services which have been completed to City's sole satisfaction. City shall pay Consultant's invoice within forty-five (45) days from the date City receives said invoice. Each invoice shall describe in detail, the services performed, the date of performance, and the associated time for completion. Any additional services approved and performed pursuant to this Agreement shall be designated as "Additional Services" and shall identify the number of the authorized change order, where applicable, on all invoices.

2.4. Records and Audits. Records of Consultant's services relating to this Agreement shall be maintained in accordance with generally recognized accounting principles and shall be made available to City or its Project Manager for inspection and/or audit at mutually convenient times from the Effective Date until three (3) years after termination of this Agreement.

### **3.0. TIME OF PERFORMANCE**

3.1. Commencement and Completion of Work. Unless otherwise agreed to in writing by the parties, the professional services to be performed pursuant to this Agreement shall commence within five (5) days from the Effective Date of this Agreement. Failure to commence work in a timely manner and/or diligently pursue work to completion may be grounds for termination of this Agreement.

3.2. Excusable Delays. Neither party shall be responsible for delays or lack of performance resulting from acts beyond the reasonable control of the party or parties. Such acts shall include, but not be limited to, acts of God, fire, strikes, pandemics (excluding COVID-19), material shortages, compliance with laws or regulations, riots, acts of war, or any other conditions beyond the reasonable control of a party (each, a "Force Majeure Event"). If a party experiences a Force Majeure Event, the party shall, within five (5) days of the occurrence of the Force Majeure Event, give written notice to the other party stating the nature of the Force Majeure Event, its anticipated duration and any action being taken to avoid or minimize its effect. Any suspension of performance shall be of no greater scope and of no longer duration than is reasonably required and the party experiencing the Force Majeure Event shall use best efforts without being obligated to incur any material expenditure to remedy its inability to perform; provided, however, if the suspension of performance continues for sixty (60) days after the date of the occurrence and such failure to perform would constitute a material breach of this Agreement in the absence of such Force Majeure Event, the parties shall meet and discuss in good faith any amendments to this Agreement to permit the other party to exercise its rights under this Agreement. If the parties are not able to agree on such amendments within thirty (30) days and if suspension of performance continues, such other party may terminate this Agreement immediately by written notice to the party experiencing the Force Majeure Event, in which case neither party shall have any liability to the other except for those rights and liabilities that accrued prior to the date of termination.

#### 4.0. TERM AND TERMINATION

4.1. Term. This Agreement shall commence on the Effective Date and continue for a period of twenty-four (24) months, ending on September 16, 2026, unless previously terminated as provided herein or as otherwise agreed to in writing by the parties. This Agreement may be extended by one (1) additional year upon mutual written agreement of both parties.

4.2. Notice of Termination. The City reserves and has the right and privilege of canceling, suspending or abandoning the execution of all or any part of the work contemplated by this Agreement, with or without cause, at any time, by providing written notice to Consultant. The termination of this Agreement shall be deemed effective upon receipt of the notice of termination. In the event of such termination, Consultant shall immediately stop rendering services under this Agreement unless directed otherwise by the City.

4.3. Compensation. In the event of termination, City shall pay Consultant for reasonable costs incurred and professional services satisfactorily performed up to and including the date of City's written notice of termination. Compensation for work in progress shall be prorated based on the percentage of work completed as of the effective date of termination in accordance with the fees set forth herein. In ascertaining the professional services actually rendered hereunder up to the effective date of termination of this Agreement, consideration shall be given to both completed work and work in progress, to complete and incomplete drawings, and to other documents pertaining to the services contemplated herein whether delivered to the City or in the possession of the Consultant.

4.4. Documents. In the event of termination of this Agreement, all documents prepared by Consultant in its performance of this Agreement including, but not limited to, finished or unfinished design, development and construction documents, data studies, drawings, maps and reports, shall be delivered to the City within ten (10) days of delivery of termination notice to Consultant, at no cost to City. Any use of uncompleted documents without specific written authorization from Consultant shall be at City's sole risk and without liability or legal expense to Consultant.

#### 5.0. INSURANCE

5.1. Minimum Scope and Limits of Insurance. Consultant shall obtain, maintain, and keep in full force and effect during the life of this Agreement all of the following minimum scope of insurance coverages with an insurance company admitted to do business in California, rated "A," Class X, or better in the most recent A.M. Best's Rating Guide, and approved by City:

- (a) Commercial general liability, including premises-operations, products/completed operations, broad form property damage, blanket contractual liability, independent contractors, personal injury or bodily injury with a policy limit of not less than One Million Dollars (\$1,000,000.00) per occurrence, Two Million Dollars (\$2,000,000.00) general aggregate.
- (b) Business automobile liability for owned vehicles, hired, and non-owned vehicles, with a policy limit of not less than One Million Dollars (\$1,000,000.00) combined single limit per accident for bodily injury and property damage.

- (c) Workers' compensation insurance as required by the State of California. Consultant agrees to waive, and to obtain endorsements from its workers' compensation insurer waiving subrogation rights under its workers' compensation insurance policy against the City, its officers, agents, employees, and volunteers arising from work performed by Consultant for the City and to require each of its subcontractors, if any, to do likewise under their workers' compensation insurance policies.
- (d) Professional errors and omissions ("E&O") liability insurance with policy limits of not less than One Million Dollars (\$1,000,000.00), combined single limits, per occurrence and aggregate. Architects' and engineers' coverage shall be endorsed to include contractual liability. If the policy is written as a "claims made" policy, the retro date shall be prior to the start of the contract work. Consultant shall obtain and maintain, said E&O liability insurance during the life of this Agreement and for three years after completion of the work hereunder.

5.2. Endorsements. The commercial general liability insurance policy and business automobile liability policy shall contain or be endorsed to contain the following provisions:

- (a) Additional insureds: "The City of Costa Mesa and its elected and appointed boards, officers, officials, agents, employees, and volunteers are additional insureds with respect to: liability arising out of activities performed by or on behalf of the Consultant pursuant to its contract with the City; products and completed operations of the Consultant; premises owned, occupied or used by the Consultant; automobiles owned, leased, hired, or borrowed by the Consultant."
- (b) Notice: "Said policy shall not terminate, be suspended, or voided, nor shall it be cancelled, nor the coverage or limits reduced, until thirty (30) days after written notice is given to City."
- (c) Other insurance: "The Consultant's insurance coverage shall be primary insurance as respects the City of Costa Mesa, its officers, officials, agents, employees, and volunteers. Any other insurance maintained by the City of Costa Mesa shall be excess and not contributing with the insurance provided by this policy."
- (d) Any failure to comply with the reporting provisions of the policies shall not affect coverage provided to the City of Costa Mesa, its officers, officials, agents, employees, and volunteers.
- (e) The Consultant's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability.

5.3. Deductible or Self-Insured Retention. If any of such policies provide for a deductible or self-insured retention to provide such coverage, the amount of such deductible or self-insured retention shall be approved in advance by City. No policy of insurance issued as to

which the City is an additional insured shall contain a provision which requires that no insured except the named insured can satisfy any such deductible or self-insured retention.

5.4. Certificates of Insurance. Consultant shall provide to City certificates of insurance showing the insurance coverages and required endorsements described above, in a form and content approved by City, prior to performing any services under this Agreement.

5.5. Non-Limiting. Nothing in this Section shall be construed as limiting in any way, the indemnification provision contained in this Agreement, or the extent to which Consultant may be held responsible for payments of damages to persons or property.

## 6.0. GENERAL PROVISIONS

6.1. Entire Agreement. This Agreement constitutes the entire agreement between the parties with respect to any matter referenced herein and supersedes any and all other prior writings and oral negotiations. This Agreement may be modified only in writing, and signed by the parties in interest at the time of such modification. The terms of this Agreement shall prevail over any inconsistent provision in any other contract document appurtenant hereto, including exhibits to this Agreement.

6.2. Representatives. The City Manager or his or her designee shall be the representative of City for purposes of this Agreement and may issue all consents, approvals, directives and agreements on behalf of the City, called for by this Agreement, except as otherwise expressly provided in this Agreement.

Consultant shall designate a representative for purposes of this Agreement who shall be authorized to issue all consents, approvals, directives and agreements on behalf of Consultant called for by this Agreement, except as otherwise expressly provided in this Agreement.

6.3. Project Managers. City shall designate a Project Manager to work directly with Consultant in the performance of this Agreement.

Consultant shall designate a Project Manager who shall represent it and be its agent in all consultations with City during the term of this Agreement. Consultant or its Project Manager shall attend and assist in all coordination meetings called by City.

6.4. Notices. Any notices, documents, correspondence or other communications concerning this Agreement, or the work hereunder may be provided by personal delivery or mail and shall be addressed as set forth below. Such communication shall be deemed served or delivered: (a) at the time of delivery if such communication is sent by personal delivery, and (b) 48 hours after deposit in the U.S. Mail as reflected by the official U.S. postmark if such communication is sent through regular United States mail.

IF TO CONSULTANT:

Fusco Engineering, Inc.  
15535 Sand Canyon  
Suite 100  
Irvine, CA 92618

IF TO CITY:

City of Costa Mesa  
77 Fair Drive  
Costa Mesa, CA 92626

Tel: (949) 274-9719  
Attn: Kyle Sherman, P.E.  
Project Manager

Tel: (714) 327-7499  
Attn: Robert Ryan

Courtesy copy to:

City of Costa Mesa  
77 Fair Drive  
Costa Mesa, CA 92626  
Attn: Finance Dept. | Purchasing

6.5. Drug-Free Workplace Policy. Consultant shall provide a drug-free workplace by complying with all provisions set forth in City's Council Policy 100-5, attached hereto as Exhibit "B" and incorporated herein. Consultant's failure to conform to the requirements set forth in Council Policy 100-5 shall constitute a material breach of this Agreement and shall be cause for immediate termination of this Agreement by City.

6.6. Attorneys' Fees. If litigation is brought by any party in connection with this Agreement, the prevailing party shall be entitled to recover from the opposing party all costs and expenses, including reasonable attorneys' fees, incurred by the prevailing party in the exercise of any of its rights or remedies hereunder or the enforcement of any of the terms, conditions, or provisions hereof.

6.7. Governing Law. This Agreement shall be governed by and construed under the laws of the State of California without giving effect to that body of laws pertaining to conflict of laws. In the event of any legal action to enforce or interpret this Agreement, the parties hereto agree that the sole and exclusive venue shall be a court of competent jurisdiction located in Orange County, California.

6.8. Assignment. Consultant shall not voluntarily or by operation of law assign, transfer, sublet or encumber all or any part of Consultant's interest in this Agreement without City's prior written consent. Any attempted assignment, transfer, subletting or encumbrance shall be void and shall constitute a breach of this Agreement and cause for termination of this Agreement. Regardless of City's consent, no subletting or assignment shall release Consultant of Consultant's obligation to perform all other obligations to be performed by Consultant hereunder for the term of this Agreement.

6.9. Indemnification and Hold Harmless. Consultant agrees to defend, indemnify, hold free and harmless the City, its elected officials, officers, agents and employees, at Consultant's sole expense, from and against any and all claims, actions, suits or other legal proceedings brought against the City, its elected officials, officers, agents and employees arising out of the negligence, recklessness, or willful misconduct of the Consultant, its employees, and/or authorized subcontractors, in the performance of the work undertaken pursuant to this Agreement. The defense obligation provided for hereunder shall apply without any advance showing of negligence or wrongdoing by the Consultant, its employees, and/or authorized subcontractors, but shall be required whenever any claim, action, complaint, or suit asserts as its basis the negligence, errors, omissions or misconduct of the Consultant, its employees, and/or authorized subcontractors, and/or whenever any claim, action, complaint or suit asserts liability against the City, its elected officials, officers, agents and employees based upon negligence, recklessness, or willful misconduct in the work performed by the Consultant, its employees, and/or

authorized subcontractors under this Agreement, whether or not the Consultant, its employees, and/or authorized subcontractors are specifically named or otherwise asserted to be liable. Notwithstanding the foregoing, the Consultant shall not be liable for the defense or indemnification of the City for claims, actions, complaints or suits arising out of the sole active negligence or willful misconduct of the City. In no event shall the cost to defend charged to Consultant exceed Consultant's proportionate percentage of fault. However, notwithstanding the previous sentence, in the event one or more defendants is unable to pay its share of defense costs due to bankruptcy or dissolution of the business, Consultant shall meet and confer with other parties regarding unpaid defense costs. This provision shall supersede and replace all other indemnity provisions contained either in the City's specifications or Consultant's Proposal, which shall be of no force and effect.

6.10. Independent Contractor. Consultant is and shall be acting at all times as an independent contractor and not as an employee of City. Consultant shall have no power to incur any debt, obligation, or liability on behalf of City or otherwise act on behalf of City as an agent. Neither City nor any of its agents shall have control over the conduct of Consultant or any of Consultant's employees, except as set forth in this Agreement. Consultant shall not, at any time, or in any manner, represent that it or any of its agents or employees are in any manner agents or employees of City. Consultant shall secure, at its sole expense, and be responsible for any and all payment of Income Tax, Social Security, State Disability Insurance Compensation, Unemployment Compensation, and other payroll deductions for Consultant and its officers, agents, and employees, and all business licenses, if any are required, in connection with the services to be performed hereunder. Consultant shall indemnify and hold City harmless from any and all taxes, assessments, penalties, and interest asserted against City by reason of the independent contractor relationship created by this Agreement. Consultant further agrees to indemnify and hold City harmless from any failure of Consultant to comply with the applicable worker's compensation laws. City shall have the right to offset against the amount of any fees due to Consultant under this Agreement any amount due to City from Consultant as a result of Consultant's failure to promptly pay to City any reimbursement or indemnification arising under this paragraph.

6.11 Conflicts with Independent Contractor. Contractor/consultant's duties and services under this Agreement shall not include preparing or assisting the public entity with any portion of the public entity's preparation of a request for proposals, request for qualifications, or any other solicitation regarding a subsequent or additional contract with the public entity. The public entity entering into this Agreement shall at all times retain responsibility for public contracting, including with respect to any subsequent phase of this project. Contractor/consultant's participation in the planning, discussions, or drawing of project plans or specifications shall be limited to conceptual, preliminary, or initial plans or specifications. Contractor/consultant shall cooperate with the public entity to ensure that all bidders for a subsequent contract on any subsequent phase of this project have access to the same information, including all conceptual, preliminary, or initial plans or specifications prepared by contractor pursuant to this Agreement.

6.12. PERS Eligibility Indemnification. In the event that Consultant or any employee, agent, or subcontractor of Consultant providing services under this Agreement claims or is determined by a court of competent jurisdiction or the California Public Employees Retirement System (PERS) to be eligible for enrollment in PERS as an employee of the City, Consultant shall indemnify, defend, and hold harmless City for the payment of any employee and/or employer contributions for PERS benefits on behalf of Consultant or its employees, agents, or



subcontractors, as well as for the payment of any penalties and interest on such contributions, which would otherwise be the responsibility of City.

Notwithstanding any other agency, state or federal policy, rule, regulation, law or ordinance to the contrary, Consultant and any of its employees, agents, and subcontractors providing service under this Agreement shall not qualify for or become entitled to, and hereby agree to waive any claims to, any compensation, benefit, or any incident of employment by City, including but not limited to eligibility to enroll in PERS as an employee of City and entitlement to any contribution to be paid by City for employer contribution and/or employee contributions for PERS benefits.

6.13. Cooperation. In the event any claim or action is brought against City relating to Consultant's performance or services rendered under this Agreement, Consultant shall render any reasonable assistance and cooperation which City might require.

6.14. Ownership of Documents. All findings, reports, documents, information and data including, but not limited to, computer tapes or discs, files and tapes furnished or prepared by Consultant or any of its subcontractors in the course of performance of this Agreement, shall be and remain the sole property of City. Consultant agrees that any such documents or information shall not be made available to any individual or organization without the prior consent of City. Any use of such documents for other projects not contemplated by this Agreement, and any use of incomplete documents, shall be at the sole risk of City and without liability or legal exposure to Consultant. City shall indemnify and hold harmless Consultant from all claims, damages, losses, and expenses, including attorneys' fees, arising out of or resulting from City's use of such documents for other projects not contemplated by this Agreement or use of incomplete documents furnished by Consultant. Consultant shall deliver to City any findings, reports, documents, information, data, in any form, including but not limited to, computer tapes, discs, files audio tapes or any other Project related items as requested by City or its authorized representative, at no additional cost to the City.

6.15. Public Records Act Disclosure. Consultant has been advised and is aware that this Agreement and all reports, documents, information and data, including, but not limited to, computer tapes, discs or files furnished or prepared by Consultant, or any of its subcontractors, pursuant to this Agreement and provided to City may be subject to public disclosure as required by the California Public Records Act (California Government Code section 7921.000 (formerly Section 6250 *et seq.*). Exceptions to public disclosure may be those documents or information that qualify as trade secrets, as that term is defined in the California Government Code section 7924.510 (formerly Section 6254.7), and of which Consultant informs City of such trade secret. The City will endeavor to maintain as confidential all information obtained by it that is designated as a trade secret. The City shall not, in any way, be liable or responsible for the disclosure of any trade secret including, without limitation, those records so marked if disclosure is deemed to be required by law or by order of the Court.

6.16. Conflict of Interest. Consultant and its officers, employees, associates and subconsultants, if any, will comply with all conflict of interest statutes of the State of California applicable to Consultant's services under this agreement, including, but not limited to, the Political Reform Act (Government Code sections 81000, *et seq.*) and Government Code section 1090. During the term of this Agreement, Consultant and its officers, employees, associates and subconsultants shall not, without the prior written approval of the City Representative, perform work for another person or entity for whom Consultant is not currently performing work that would

require Consultant or one of its officers, employees, associates or subconsultants to abstain from a decision under this Agreement pursuant to a conflict of interest statute.

6.17. Responsibility for Errors. Consultant shall be responsible for its work and results under this Agreement. Consultant, when requested, shall furnish clarification and/or explanation as may be required by the City's representative, regarding any services rendered under this Agreement at no additional cost to City. In the event that an error or omission attributable to Consultant occurs, then Consultant shall, at no cost to City, provide all necessary design drawings, estimates and other Consultant professional services necessary to rectify and correct the matter to the sole satisfaction of City and to participate in any meeting required with regard to the correction.

6.18. Prohibited Employment. Consultant will not employ any regular employee of City while this Agreement is in effect.

6.19. Order of Precedence. In the event of an inconsistency in this Agreement and any of the attached Exhibits, the terms set forth in this Agreement shall prevail. If, and to the extent this Agreement incorporates by reference any provision of any document, such provision shall be deemed a part of this Agreement. Nevertheless, if there is any conflict among the terms and conditions of this Agreement and those of any such provision or provisions so incorporated by reference, this Agreement shall govern over the document referenced.

6.20. Costs. Each party shall bear its own costs and fees incurred in the preparation and negotiation of this Agreement and in the performance of its obligations hereunder except as expressly provided herein.

6.21. Binding Effect. This Agreement binds and benefits the parties and their respective permitted successors and assigns.

6.22. No Third Party Beneficiary Rights. This Agreement is entered into for the sole benefit of City and Consultant and no other parties are intended to be direct or incidental beneficiaries of this Agreement and no third party shall have any right in, under or to this Agreement.

6.23. Headings. Paragraphs and subparagraph headings contained in this Agreement are included solely for convenience and are not intended to modify, explain or to be a full or accurate description of the content thereof and shall not in any way affect the meaning or interpretation of this Agreement.

6.24. Construction. The parties have participated jointly in the negotiation and drafting of this Agreement and have had an adequate opportunity to review each and every provision of the Agreement and submit the same to counsel or other consultants for review and comment. In the event an ambiguity or question of intent or interpretation arises with respect to this Agreement, this Agreement shall be construed as if drafted jointly by the parties and in accordance with its fair meaning. There shall be no presumption or burden of proof favoring or disfavoring any party by virtue of the authorship of any of the provisions of this Agreement.

6.25. Amendments. Only a writing executed by the parties hereto or their respective successors and assigns may amend this Agreement.

6.26. Waiver. The delay or failure of either party at any time to require performance or compliance by the other of any of its obligations or agreements shall in no way be deemed a waiver of those rights to require such performance or compliance. No waiver of any provision of this Agreement shall be effective unless in writing and signed by a duly authorized representative of the party against whom enforcement of a waiver is sought. The waiver of any right or remedy in respect to any occurrence or event shall not be deemed a waiver of any right or remedy in respect to any other occurrence or event, nor shall any waiver constitute a continuing waiver.

6.27. Severability. If any provision of this Agreement is determined by a court of competent jurisdiction to be unenforceable in any circumstance, such determination shall not affect the validity or enforceability of the remaining terms and provisions hereof or of the offending provision in any other circumstance. Notwithstanding the foregoing, if the value of this Agreement, based upon the substantial benefit of the bargain for any party, is materially impaired, which determination made by the presiding court or arbitrator of competent jurisdiction shall be binding, then both parties agree to substitute such provision(s) through good faith negotiations.

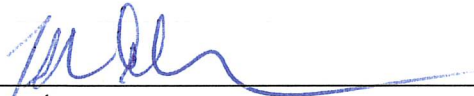
6.28. Counterparts. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original. All counterparts shall be construed together and shall constitute one agreement.

6.29. Corporate Authority. The persons executing this Agreement on behalf of the parties hereto warrant that they are duly authorized to execute this Agreement on behalf of said parties and that by doing so the parties hereto are formally bound to the provisions of this Agreement.

[Signatures appear on following page.]

**IN WITNESS WHEREOF**, the parties hereto have caused this Agreement to be executed by and through their respective authorized officers, as of the date first above written.

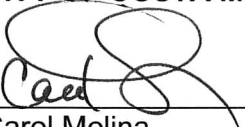
**CONSULTANT**

  
\_\_\_\_\_  
Signature

Date: 9/19/2024

KYLE SHERMAN, PROJECT MANAGER  
[Name and Title]

**CITY OF COSTA MESA**

  
\_\_\_\_\_  
Carol Molina  
Finance Director

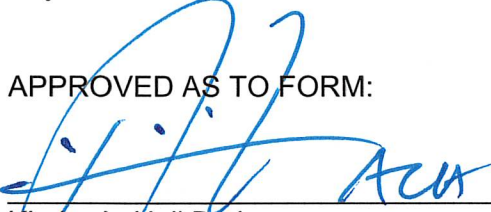
Date: 9/24/24

**ATTEST:**

Brenda Green 10/28/2024  
Brenda Green  
City Clerk



**APPROVED AS TO FORM:**

  
\_\_\_\_\_  
Kimberly Hall Barlow  
City Attorney


Date: 10/14/24

**APPROVED AS TO INSURANCE:**

  
\_\_\_\_\_  
Ruth Wang  
Risk Management

Date: 9/25/24

APPROVED AS TO CONTENT:

  
\_\_\_\_\_  
Robert Ryan  
Project Manager

Date: 9/30/24

DEPARTMENTAL APPROVAL:

  
\_\_\_\_\_  
Raja Sethuraman  
Director of Public Works

Date: 10-1-24

**EXHIBIT A**

**CONSULTANT'S PROPOSALS**

**EXHIBIT A**

**Scope of Services & Fee Proposal**

**City of Costa Mesa, Public Works**

**TeWinkle Park Baseball Fields**

September 3, 2024

**1.0 PROJECT DESCRIPTION**

TeWinkle Park Baseball fields are currently experiencing localized ponding, resulting in closures of the fields during and after storm events where the field should remain open. Overall, the goal is to provide proper drainage for the field with minimal disturbance to the site.

**2.0 PURPOSE OF SERVICES**

Study the existing baseball field(s) to determine ponding drainage areas, and provide two (2) design alternatives to the City of Costa Mesa for consideration of construction to alleviate the ponding.

Option 1: Provide drainage from the baseball field by designing stormwater inlets and conveyance systems to a low point east of the fields, in TeWinkle Park.

Option 2: Provide drainage from the baseball field by designing stormwater inlets and conveyance systems to a low point in Presidio Square, North of the Baseball fields.

**Assumptions and Exclusions:**

1. Two (2) assessments are included in this plan. Once survey data is obtained and low points are identified, engineer will provide locations to the City for review, with a brief description of the planned approach. Should the City & engineer deem a specific solution infeasible, an assessment will not be provided for that solution. Alternatively, should the city and Engineer agree to adjust assessment(s) outlet, an adjusted assessment will be provided within scope.
2. While assessments may have enough information for construction, no formal construction documents will be provided as part of this study.
3. No survey is to be performed as part of this study. GIS data will be utilized to identify the relative grading within the area.
4. The civil study cost estimates will provide estimated costs for civil items only. Discipline costs outside of Civil Engineering (e.g. building construction, building plumbing, tree installation, irrigation systems) will be quantified without cost as part of the study.
5. Civil cost estimate is engineers best estimate of Costs, utilizing data from public records, prior projects, and understanding of material availability. Cost Estimate may not reflect eventual construction costs provided by the contractor.
6. Requested revisions to assessments after the start of the assessment may result in additional scoping and fee at the engineer's discretion.

7. No mapping services, such as legal descriptions and plats, these items are not anticipated as part of this work.
8. A hydrology report and a Water Quality Report (WQMP) is not included.

### **3.0 ENGINEERING SERVICES**

#### **Task 1. Site Investigation**

Visit the site for observational notes, research existing utility maps and drainage structures, and collect GIS data for use as underlying design topography and elevation information.

#### **Task 2. Site Assessments**

Prepare two (2) site assessments for TeWinkle Park. Each assessment will include a layout plan, detail sheet (for any drainage structures), and a sheet for cross sections.

#### **Task 3. Assessment Cost Estimates**

Prepare two (2) cost estimates for the three site assessments prepared as part of Task 2. Cost estimates will include approximated quantities of the construction items and cost estimates as best understood by the engineer using record data (or unit costs provided to engineer by the Client).

#### **Task 4. Project Coordination**

Provide Project Coordination, such as meeting attendance, coordination with the City, and any additional studies or exhibits as requested by the Client.

20-hours has been estimated for this task on a time and material basis. Time spent in excess of the estimated amount will be billed at the appropriate rate.

#### **Additional Services Available but Not Included**

- *Technology*
  - *Aerial Scanning*
  - *Scan to REVIT Existing Buildings (Interior & Exterior)*
  - *Animated View Simulations*
  - *VR Modeling*
  - *Artificial Intelligence*



**SUMMARY OF SCOPE OF WORK AND FEES**

		<u>Org.</u>		
Task 1.	Site Investigation	COM	FEE	\$1,800
Task 2.	Site Assessments	COM	T&M	\$8,800
Task 3.	Assessment Cost Estimates	COM	FEE	\$2,700
Task 4.	Project Coordination	COM	T&M	\$4,800
			<b>PROPOSAL TOTAL</b>	<b>\$18,100</b>

**Reimbursables Budget (Est.) \$700**

**\*Not to exceed without prior authorization**

**This Fee Proposal is Valid for Thirty (30) Days from the Date of this Document.**

Fusco Engineering, Inc. will perform the services on a fixed fee basis, except where noted. Services rendered outside of the scope will be performed at prevailing hourly rates. Costs of reprographics, deliveries and out-of-pocket expenses are not included and will be considered reimbursable. A 10% surcharge will be added to the reimbursables to cover handling expenses.

It is the policy of Fuscoe to meet all schedule requirements while maintaining a competent and professional level of service. In return, it is expected that all invoices will be paid within thirty (30) days of receipt. Failure to do so could result in cessation of services and/or reassessment of service.

**4.0 AVAILABLE OPTIONAL SERVICES**

- 4.1 Preparing for and attending meetings, presentations or hearings beyond those fairly called for in the Basic Services as requested by Client or reasonably necessary to facilitate the Project, and assisting Client in any reasonable or appropriate manner in challenging the decisions of any government or quasi-governmental agency concerning the Project.
- 4.2 Providing presentation materials not fairly called for by the Basic Services such as colored renderings, models and computer modeling.
- 4.3 Making revisions to plans or other documents when such revisions are (i) inconsistent with approvals or instructions previously given by Client, including revisions made necessary by changes in the Project program, budget, scheduling or phasing; (ii) required by the enactment, amendment or revised interpretation of codes, zoning, building ordinances or other governmental requirements subsequent to the preparation of such documents, or by discretionary decisions by building officials or inspectors inconsistent with prior approvals; or (iii) due to changes required as the result of the Client's failure to render decisions in a timely manner or to field or other conditions of which Consultant was not fairly informed.
- 4.4 Providing services (i) because of Project changes concerning size, quality, complexity, schedule, phasing or the method of procuring construction contracts; (ii) required due to a Project suspension, or changes in Project management, or by defects or deficiencies in the work or services provided by or the termination of other consultants or any Project contractor or in connection with contractor proposals or claims; or (iii) due to conditions or circumstances not now anticipated or reasonably foreseeable.

**5.0 SERVICE CLARIFICATIONS**

- 5.1 Consultant's services will be performed in a timely manner consistent with good professional practice and the desire that the Project proceeds as expeditiously as practical; and it will use its best efforts to meet any mutually agreed upon schedule, which schedule will be adjusted only for reasonable cause or by mutual consent.
- 5.2 Consultant's services will be performed in accordance with generally and currently accepted design professional principles and practices as embodied in the standard procedures and protocols of Consultant and its sub-consultants, and without warranties, either expressed or implied. In particular, Consultant will use its best professional judgment in interpreting and applying the requirements of all laws applicable to the services such as building codes, grading ordinances, accessibility requirements and statutory functionality standards; but compliance with these laws as they may eventually be interpreted by others cannot be guaranteed. In no event will Consultant guarantee cost, schedule or quantity estimates or projections, or any prognostications as to future events, including the discretionary decisions of governmental officials; and when used in conjunction with the providing of services pursuant to this Agreement, such terms as "certify," "warrant," "confirm," "make sure," "insure," "ensure," "assure," or the like do not constitute a guarantee, but rather a representation based on professional opinion or judgment.
- 5.3 All instruments of service provided pursuant to this Agreement including plans, calculations and estimates shall, unless expressly agreed otherwise in writing, be prepared pursuant to Consultant's standard procedures and protocols and in its standard formats and level of quality and detail.
- 5.4 Consultant will undertake professional responsibility for only the design professional services expressly undertaken by this Agreement, and not otherwise; and in particular Consultant will not be legally liable for providing or failing to provide services (i) concerning legal, financial, planning or environmental matters; (ii) soils, geotechnical, hazardous waste/toxic substances, traffic, electrical, mechanical or structural engineering; or (iii) landscape architectural or irrigation design. Further and without limitation, Consultant will not be responsible for delays or other matters beyond its reasonable control; for inaccurate or incomplete information provided by Client or other reasonably reliable sources; for services or instruments of service provided by others even if incorporated into Consultant's instruments of service for ease of reference or otherwise; for any subsurface site conditions or any surface or other conditions of which it has not been timely informed; for hazardous materials or toxic substance at the Project site; or for the actions or inaction of others including other consultants, utility companies and governmental or quasi-governmental agencies.
- 5.5 In no event will Consultant serve as, supervise or have any responsibility for the performance of any construction contractors; and in particular Consultant will have no responsibility for construction means, methods, techniques, sequences or procedures including without limitation excavation or shoring procedures or for any construction safety procedures or programs.
- 5.6 Consultant's work shall be based upon a fully dimensioned Client approved site plan in an AutoCAD format at start of final engineering phase. Subsequent changes, modifications and/or revisions to the site plan after Consultant begins the final engineering phase, which cause Consultant to revise portions and/or all of said work, shall be considered as "Additional Services" and subject to separate scope and fee negotiations.
- 5.7 Consultant's work shall be based upon a Client provided geotechnical investigation report identifying the existing soil characteristics, recommended pavement thickness and recommended site and building grading requirements and/or specifications prior to the start of the work. Subsequent changes, modifications and/or revisions to the report after Consultant begins work, which cause Consultant to revise portions and/or all of said work, shall be considered as "Additional Services" and subject to separate scope and fee negotiations.
- 5.8 Consultant's work shall be based upon a Client provided owner's design requirements/criteria, local agency conditions of approval, local agency conditional use permit, etc., prior to the start of the work. Receipt of said documents after Consultant begins work, which cause Consultant

- to review portions and/or all of said work, shall be considered as "Additional Services" and subject to separate scope and fee negotiations.
- 5.9 Consultant assumes that perimeter streets and existing water, sewer, storm drains, gas, electrical, and telephone utilities are of sufficient size and capacity for the proposed development. Should improvement plans be required to upgrade or modify said existing improvements, then the preparation of said plans shall be considered "Additional Services" and subject to separate scope and fee negotiations.
- 5.10 The Scope of Services for final engineering shall be considered 100% complete upon the technical approval of the plans by the reviewing agencies.
- 5.11 Any work resulting from changes to current standards, ordinances, and/or governing agency personnel after the date of the Agreement which materially impact the design or processing of this Project or which results in re-design or material changes in the design shall be performed as "Additional Services" and subject to separate scope and fee negotiations.
- 5.12 Consultant will not be responsible for supervision of contractor's employees nor direct supervision of construction crews.
- 5.13 Those items of work not specifically addressed in the Data and Assumptions and Scope of Services shall not be considered a part thereof, and shall be considered as "Additional Services" and subject to separate scope and fee negotiations.
- 5.14 Improvement plans for sewer, water, and public streets will be prepared at a scale of 1"=40' and will include a plan view and profile of the centerline of the improvement. Additionally, street improvement plans will include profiles of the top of curb where the curb and gutter are being constructed from the plans prepared hereunder. Intersection details showing grading contours are not anticipated and are not included. Striping plans are not included unless specifically stated elsewhere in the Scope of Services, and shall constitute "Additional Services" and be subject to separate scope and fee negotiation.

Items specifically excluded from the Agreement consist of, but are not necessarily limited to, the following:

- 5.15 Supplemental topo.
- 5.16 ALTA/ACSM land title survey maps lot line adjustments (after map recordation).
- 5.17 Soils or subsurface investigation.
- 5.18 "Potholing," physically digging to expose objects to be located and measured.
- 5.19 Scheduling, coordination and/or witnessing of fire flow tests to determine available water pressures and fire flows.
- 5.20 Coordination with local gas, electrical, telephone, and cable television companies for the design and/or preparation of plans and/or service agreements for new and/or relocated service facilities.
- 5.21 Preparation, approval or processing of site plan.
- 5.22 Conditional use permit processing.
- 5.23 Utility coordination (quitclaims and/or non-interference letters and will-serve letters).
- 5.24 Tentative map processing through public agencies.
- 5.25 Preparation of legal descriptions and/or plats.
- 5.26 Preparation of easement or grant deeds.
- 5.27 Legal descriptions and plats required for annexation, zone changes or zoning maps.
- 5.28 Legal descriptions and plats required for formation of or annexation to maintenance, assessment or other special districts (landscape, water, sewer, etc.).
- 5.29 Final mapping.

## Scope of Services & Fee Proposal

### City of Costa Mesa, Public Works

TeWinkle Park Baseball Fields

September 3, 2024

- 5.30 Condominium plans.
- 5.31 "Covenants, Conditions and Restrictions" documents.
- 5.32 Excavation plan which may or may not be required by the agency.
- 5.33 Preparation of haul route plan for import/export of soil.
- 5.34 Guard house and gated entry plans.
- 5.35 Plans for the drainage system beneath the buildings.
- 5.36 Preparation of parking lot striping and/or signage plan.
- 5.37 Preparation of landscape plans for softscape areas, hardscape areas, and enhanced pavement areas for driving and/or walking.
- 5.38 Preparation of irrigation system plans.
- 5.39 Preparation of site lighting plan for parking lots and walkways.
- 5.40 Preparation of building fire suppression system plans.
- 5.41 Dry utility services.
- 5.42 Traffic signal plans.
- 5.43 Construction traffic control plan.
- 5.44 Preparation of project specifications and construction agreement.
- 5.45 Construction administration for bidding, award and observation.
- 5.46 Construction phase coordination.
- 5.47 Setting off-site monumentation deemed necessary by the governing authority.
- 5.48 Corner record or certificate tie sheet preparation and filing.
- 5.49 Any work resulting from changes to current standards, ordinances and/or governing agency personnel after the date of the Agreement which materially impact the design or processing of this Project or which results in redesign or material changes in the design shall be performed as "Additional Services" and be subject to separate scope and fee negotiation.
- 5.50 Fees contained in the Agreement do not include title company fees, agency fees, environmental studies, subordination agreements, relocation of franchise utilities, design of on-site franchise utilities, traffic impact studies, or traffic signal design.

#### **6.0 CLIENT RESPONSIBILITIES**

In conjunction with Consultant's performance, and as a material factor in the determination of Consultant's fee, Client shall make reasonable efforts to cooperate with Consultant including without limitation:

- 6.1 Designate a single representative with appropriate authority with whom Consultant can deal; and direct all communications to Consultant's project manager.
- 6.2 Provide all relevant Project information to Consultant in a timely manner; and respond to Consultant's questions and requests for information and approval within a reasonable time.
- 6.3 Provide appropriate coordination with and among the Project's various consultants.
- 6.4 Refrain from authorizing or allowing recorded or unrecorded deviations from Consultant's instruments of service, or the use of Consultant's unfinalized instruments of service for estimating or other purposes without Consultant's knowledge and consent.

#### **7.0 FEE**

- 7.1 Consultant's Additional Services fee shall be pursuant to its then current fee schedule (copy of current schedule attached), or as the parties may otherwise agree at the time the services are undertaken.

**Scope of Services & Fee Proposal**  
**City of Costa Mesa, Public Works**

TeWinkle Park Baseball Fields

September 3, 2024

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- 7.2 The reimbursable expenses for which Client shall be responsible at a multiple of 1.10 include those costs reasonably and appropriately incurred for the Project for such matters as document reproduction, deliveries, travel, long distance telephone and facsimile charges, and any fees or costs advanced by Consultant as a Client accommodation.
- 7.3 Consultant will provide Client with monthly invoices accurately reflecting as appropriate the progress of the services and current expenditures of professional time and reimbursable expenses. Each invoice shall be due and payable upon receipt, and delinquent 30 days after its date. In the event of delinquency, interest shall accrue from the invoice date at 1.5% per month, compounded monthly, or the highest rate permitted by applicable law, whichever is lower, with payments applied first to accrued interest, and Consultant shall have the right to suspend performance and to withhold or withdraw any instruments of service or related licenses with no liability for so doing. No deductions shall be made from Consultant's compensation on account of problems or losses for which Consultant has not been held legally liable. Consultant's fee will be equitably adjusted in the event of significant changes in the Project's scope, sequencing, phasing or scheduling, should prevailing wage requirements be imposed upon Consultant, or should Client expressly request expedited performance.



## EXHIBIT B

### 2023 - 2024 RATE SCHEDULE

<b>CLASSIFICATION</b>	<b>HOURLY RATE</b>
President / Vice President / Principal / Sr. Project Manager / Dir. Of Geospatial / Certified Photogrammetrist	\$260
Project Manager / Technical Manager / Sr. Land Surveyor	\$229
Assoc. Project Manager / Sr. Engineer / Sr. Designer / Sr. Stormwater Engineer/ Specialist	\$208
AT/Cloud Registration Specialist / Land Surveyor / Engineer II / Designer II	\$190
Engineer I / Designer I / Project Scientist / GIS Analyst	\$184
Sr. Survey Analyst / Sr. Mapping Analyst	\$175
GIS Coordinator / Data Scientist	\$165
Assoc. Engineer / Stormwater Engineer / Stormwater Tech. / Plan Processor	\$152
Geospatial Specialist / Survey Analyst / Mapping Analyst	\$150
Stormwater Inspector	\$130
3D Artist / Survey Technician	\$125
Image Technician	\$110
Information Coordinator	\$105
1-Man Survey Crew	\$217
2-Man Survey Crew	\$340
3-Man Survey Crew	\$433

1. Reproduction and other reimbursable expenses (such as overnight deliveries, mileage, permits, and licenses, etc.) and Client approved subcontractor services will be billed in addition to the above rates with a 10% handling surcharge.
2. This rate schedule is subject to change on an annual basis due to the granting of wage increases and/or other employer benefits to field or office employees during the lifetime of this agreement and Client approved change orders.
3. Overtime is available for critical deadlines at 1-1/2 times the normal rates for office employees. Surveyors' rates are also adjusted automatically for overtime or holiday/weekend work in agreement with the Operating Engineers Union.

**Client Initials** \_\_\_\_\_

Effective through August 31, 2024



## STANDARD FORM OF AGREEMENT FOR PROFESSIONAL SERVICES

This Agreement is entered into on this \_\_\_\_ day of \_\_\_\_\_ 202\_, by and between:

Client

*and* Consultant

**City of Costa Mesa, Public Works**  
77 Fair Drive  
Costa Mesa, CA 92626

Phone: 714.327.7499  
Fax:

E-mail: Robert.Ryan@costamesaca.gov

Contact: Robert Ryan, Maintenance Services  
Manager

**Fusco Engineering, Inc.**  
15535 Sand Canyon Avenue, Suite 100  
Irvine, CA 92618

Phone: 949.474.1960  
Fax: 949.474.5315

E-mail: ksherman@fuscoe.com

Project Manager: Kyle Sherman  
P.E. No.: 82251

### Client and Consultant agree as follows:

1. Client retains Consultant to perform services for: **TeWinkle Park Baseball Fields**; hereinafter called "Project."
2. CONSULTANT agrees to perform the following scope of services: attached hereto as Exhibit A.
3. Client agrees to compensate CONSULTANT for such services outlined in Exhibit A, pursuant to Rate Schedule attached hereto as Exhibit B.
4. CONSULTANT and its employees, subsidiaries, independent professional associates, sub-consultants, and subcontractors will exercise the degree of care and skill ordinarily practiced under similar circumstances by engineering professionals providing similar services. Client agrees that services provided will be rendered without any warranty, express or implied. CONSULTANT shall exercise usual and customary professional care in its efforts to comply with applicable codes, regulations, laws, rules, ordinances, and such other requirements in effect as of the date of execution of this Agreement.
5. CONSULTANT shall be entitled to rely, without liability, on the accuracy and completeness of any and all information and services provided by Client, Client's consultants and contractors. CONSULTANT will not be legally liable for the providing of, or the failure to provide legal, environmental, financial analysis, or geotechnical, soils, structural, mechanical, electrical or other engineering services, even if information from others is incorporated into consultant's instruments of service for ease of reference or otherwise. Further, and without limitation, CONSULTANT will not be responsible for delays or other matters beyond its reasonable control; for site conditions of which it was not informed; for hazardous materials or toxic substances at the Project site; for construction means, methods, techniques, sequences or procedures, including without limitation excavation, shoring, demolition or erection procedures or construction safety precautions and programs; for the timeliness or quality of contractor performance or for the failure of any contractor to perform work in accordance with the Project's construction documents; or for actions or inaction of third parties including other consultants, utility companies and governmental or quasi-governmental agencies.

6. In recognition of the relative risks, rewards and benefits of the Project to both the Client and the CONSULTANT, the risks have been allocated such that the Client agrees, to the fullest extent allowed by law, to limit the total aggregate liability for any and all claims, losses, expenses, or damages arising out of this Agreement, of CONSULTANT and its employees, agents and subconsultants, to Client and Client's affiliated individuals and entities, contractors and successors and assigns, to the amount of consultant's fee received concerning the Project. Client further agrees to indemnify and hold CONSULTANT, its employees, agents and subconsultants, harmless from all damage, liability and cost, including attorney's fees, arising out of this Agreement or relating to the Project excepting only those damages, liabilities or costs caused by the negligence or willful misconduct of CONSULTANT.
7. The parties acknowledge that each is a business entity, and that each intends that its involvement with the Project should not subject its affiliated individuals to personal exposure for the risks attendant to that involvement; and therefore, any claim which either party has or might have concerning the Project and or this Agreement shall be asserted only against the other's business entity.
8. CONSULTANT shall maintain professional liability, general liability and workers compensation insurance.
9. To the extent any damage, liability, loss, expense or cost, including attorney's fees, is caused by a negligent act, error, or omission of CONSULTANT, or any person employed by CONSULTANT, and arises out of the performance of this Agreement, CONSULTANT shall indemnify and hold the Client harmless therefrom. The Parties expressly agree in no event shall the indemnification obligation of the CONSULTANT include a duty to defend any claims, causes of action, demands, costs or lawsuits in connection with or arising out of this Project if damages were not caused by the negligence of the CONSULTANT in performance of services under this Agreement.
10. This Agreement supersedes all negotiations and prior agreements concerning the Project and is intended as a complete and exclusive statement of the entire Agreement between Client and CONSULTANT concerning the Project. Subsequent modifications to this Agreement shall be in writing and signed by both Client and CONSULTANT.
11. This Agreement shall be interpreted and enforced under and pursuant to the laws of the State of California. In the event of any dispute concerning this Agreement and/or the Project, each party shall bear its own attorney's fees. The venue for any dispute shall be Orange County, California.
12. The Parties hereby mutually waive any claims for consequential damages which either might have against the other concerning this Agreement or its termination.
13. The Client and CONSULTANT agree to resolve any claim or dispute arising out of this Agreement first through negotiation. If the parties cannot come to an agreement through negotiation, they shall submit all claims and disputes to non-binding mediation prior to the initiation of legal proceedings including litigation. This provision shall survive completion or termination of this Agreement; however, neither party shall seek resolution of any claim or dispute arising out of this Agreement beyond the period of time that would bar the initiation of legal proceedings to litigate such claim or dispute under the applicable law.
14. The CONSULTANT grants the Client a license to use the consultant's Instruments of Service for the purpose of the construction of the project under this agreement once the CONSULTANT has been paid in full for all services rendered. Any misuse, reuse or distribution to third parties without such express written permission or project-specific adaptation by the CONSULTANT shall be at the Client's sole risk and without liability to the CONSULTANT. The Client shall, to the fullest extent permitted by law, defend, indemnify, and hold harmless the CONSULTANT from and against any and all costs, expenses, fees, losses, claims, demands, liabilities, suits, actions, and damages arising out of or resulting from such unauthorized reuse or distribution.





IRVINE  
SAN DIEGO  
ONTARIO  
LOS ANGELES

*CLIENT:*

*CITY OF COSTA MESA, PUBLIC WORKS*

By: \_\_\_\_\_

\_\_\_\_\_  
(Signature)

Title: \_\_\_\_\_

Date: \_\_\_\_\_

*CONSULTANT:*

*FUSCOE ENGINEERING, INC.*

By: \_\_\_\_\_

\_\_\_\_\_  
(Signature)

Title: \_\_\_\_\_

Date: \_\_\_\_\_

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**EXHIBIT B**

**CITY COUNCIL POLICY 100-5**

# CITY OF COSTA MESA, CALIFORNIA

## COUNCIL POLICY

SUBJECT	POLICY NUMBER	EFFECTIVE DATE	PAGE
DRUG-FREE WORKPLACE	100-5	8-8-89	1 of 3

### BACKGROUND

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Under the Federal Drug-Free Workplace Act of 1988, passed as part of omnibus drug legislation enacted November 18, 1988, contractors and grantees of Federal funds must certify that they will provide drug-free workplaces. At the present time, the City of Costa Mesa, as a sub-grantee of Federal funds under a variety of programs, is required to abide by this Act. The City Council has expressed its support of the national effort to eradicate drug abuse through the creation of a Substance Abuse Committee, institution of a City-wide D.A.R.E. program in all local schools and other activities in support of a drug-free community. This policy is intended to extend that effort to contractors and grantees of the City of Costa Mesa in the elimination of dangerous drugs in the workplace.

### PURPOSE

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It is the purpose of this Policy to:

1. Clearly state the City of Costa Mesa's commitment to a drug-free society.
2. Set forth guidelines to ensure that public, private, and nonprofit organizations receiving funds from the City of Costa Mesa share the commitment to a drug-free workplace.

### POLICY

The City Manager, under direction by the City Council, shall take the necessary steps to see that the following provisions are included in all contracts and agreements entered into by the City of Costa Mesa involving the disbursement of funds.

1. Contractor or Sub-grantee hereby certifies that it will provide a drug-free workplace by:
  - A. Publishing a statement notifying employees that the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance is prohibited in Contractor's and/or sub-grantee's workplace, specifically the job site or location included in this contract, and specifying the actions that will be taken against the employees for violation of such prohibition;
  - B. Establishing a Drug-Free Awareness Program to inform employees about:

SUBJECT	POLICY NUMBER	EFFECTIVE DATE	PAGE
DRUG-FREE WORKPLACE	100-5	8-8-89	2 of 3

1. The dangers of drug abuse in the workplace;
  2. Contractor's and/or sub-grantee's policy of maintaining a drug-free workplace;
  3. Any available drug counseling, rehabilitation and employee assistance programs; and
  4. The penalties that may be imposed upon employees for drug abuse violations occurring in the workplace;
- C. Making it a requirement that each employee to be engaged in the performance of the contract be given a copy of the statement required by subparagraph A;
- D. Notifying the employee in the statement required by subparagraph 1 A that, as a condition of employment under the contract, the employee will:
1. Abide by the terms of the statement; and
  2. Notify the employer of any criminal drug statute conviction for a violation occurring in the workplace no later than five (5) days after such conviction;
- E. Notifying the City of Costa Mesa within ten (10) days after receiving notice under subparagraph 1 D 2 from an employee or otherwise receiving the actual notice of such conviction;
- F. Taking one of the following actions within thirty (30) days of receiving notice under subparagraph 1 D 2 with respect to an employee who is so convicted:
1. Taking appropriate personnel action against such an employee, up to and including termination; or
  2. Requiring such employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health agency, law enforcement, or other appropriate agency;

SUBJECT	POLICY NUMBER	EFFECTIVE DATE	PAGE
DRUG-FREE WORKPLACE	100-5	8-8-89	3 of 3

- G. Making a good faith effort to maintain a drug-free workplace through implementation of subparagraphs 1 A through 1 F, inclusive.
2. Contractor and/or sub-grantee shall be deemed to be in violation of this Policy if the City of Costa Mesa determines that:
    - a. Contractor and/or sub-grantee has made a false certification under paragraph 1 above;
    - b. Contractor and/or sub-grantee has violated the certification by failing to carry out the requirements of subparagraphs 1 A through 1 G above;
    - c. Such number of employees of Contractor and/or sub-grantee have been convicted of violations of criminal drug statutes for violations occurring in the workplace as to indicate that the contractor and/or sub-grantee has failed to make a good faith effort to provide a drug-free workplace.
  3. Should any contractor and/or sub-grantee be deemed to be in violation of this Policy pursuant to the provisions of 2 A, B, and C, a suspension, termination or debarment proceeding subject to applicable Federal, State, and local laws shall be conducted. Upon issuance of any final decision under this section requiring debarment of a contractor and/or sub-grantee, the contractor and/or sub-grantee shall be ineligible for award of any contract, agreement or grant from the City of Costa Mesa for a period specified in the decision, not to exceed five (5) years. Upon issuance of any final decision recommending against debarment of the contractor and/or sub-grantee, the contractor and/or sub-grantee shall be eligible for compensation as provided by law.