


TO: BOARD OF DIRECTORS  
FROM: BRUCE BUEL   
DATE: JUNE 22, 2007

**AGENDA ITEM**  
**D-5**  
**JUNE 27, 2007**

**AUTHORIZE EXECUTION OF AGREEMENT FOR PARKS FUNDING EVALUATION**

**ITEM**

Authorize execution of agreement with the Wallace Group to provide parks funding district evaluation [RECOMMEND ADOPTION].

**BACKGROUND**

Your Honorable Board previously approved a scope of work and directed staff to solicit proposals for completion of that scope of work. Your Honorable Board also adopted a FY07-08 Budget that funds the evaluation with \$30,000 in property tax proceeds. Attached is a proposal from the Wallace Group to implement the approved scope of work on a time-and-materials basis with a not-to-exceed expenditure limit of \$29,300.

**RECOMMENDATION**

Staff recommends that your Honorable Board direct the President to execute a standard consulting services agreement with the Wallace Group to perform the scope of work set forth in the proposal on a time-and-materials basis with a not-to-exceed expenditure limit of \$29,300.

**ATTACHMENT**

- \* WALLACE PROPOSAL

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April 24, 2007

Mr. Bruce Buel, General Manager  
Nipomo Community Services District  
P.O. Box 326  
Nipomo, California 93444-0326

Subject: Engineering Services for Miller Park Funding District Formation: Phase I

Dear Mr. Buel:

Wallace Group (WG) appreciates the opportunity to provide you with our proposal for engineering services for the above referenced project. Based on our discussion, the following Scope of Work has been prepared for your consideration:

### **SCOPE OF WORK**

#### **Task 1.0 Project Initiation**

WG will attend a kick-off meeting with District staff. WG will prepare an agenda and provide the District with meeting minutes. The meeting will include discussion of the proposed Scope of Work for Miller Park, an approximate location of the zone of benefit, review the method or formula proposed to divide the cost amongst the parcels and determine the appropriate assessment district law section(s) to be used for the project. WG will review various documents provided by the District, including the following:

- Concept Plans
- Olde Town Nipomo Design and Circulation Plan
- Tefft Street Development Plans (WG)
- Listing of Nipomo CSD (NCSD) Assumptions

#### **Task 2.0 Proposition 218 Research**

WG will research Proposition 218 requirements and new regulations. WG will review the options available for funding the capital and operational expenses for the referenced project. WG will prepare a letter report summarizing the findings.

#### **Task 3.0 Initial Capital and Operations Cost Allowances**

WG will prepare an Opinion of Probable Costs for the hard and soft costs to construct Miller Park based on the discussed Scope of Work. WG will also complete a life cycle analysis to establish the initial operating costs. WG will prepare a letter report summarizing the findings.

#### **Task 4.0 Development of the Data Base for the Funding District**

Based on information provided by NCSD and San Luis Obispo County Assessor offices, WG will develop a database containing a list of all parcels in the project area and their attributes such as:

- Assessor Parcel Number (APN) or lot number from tract maps
- Assessment Number
- Property Owner
- Site Address
- Property Owners' Mailing Address
- Benefit Unit Assignment



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GIS SOLUTIONS  
WATER RESOURCES  
WALLACE SWANSON  
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WALLACE GROUP  
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This information will be used to develop the Assessment Roll and the assessment spread by providing the number of parcels and number of benefit units within the proposed assessment district. This information may also be used in the development of mailing labels for public hearings and in providing the parcel information for funds to be collected through property taxes.

#### **Task 5.0 Draft Assessment Spread**

WG will prepare and distribute to NCSD staff, a Preliminary Assessment Spread that determines general and specific benefits of developing and maintaining Miller Park. The Preliminary Assessment Spread will include:

- A description of the service proposed to be financed through the revenue derived from the assessment
- The potential Zones of Benefit by distance and/or use
- An estimated range of capital and operating costs
- A detailed explanation of the method or formula by which the costs are to be allocated to the assessed parcels
- A proposed range of assessments per parcel for capital and operational expenses
- A draft diagram showing the proposed boundary
- Each parcel shall be given a separate assessment number on the diagram. The diagram may refer to the County Assessor's maps for a detailed description of the lines and dimensions of any parcels, in which case those maps shall govern for all details concerning the lines and dimensions of the parcels.
- An Assessment Roll showing the assessment number of each parcel to be assessed and the amount of each proposed assessment. The assessment shall refer to the parcels by their respective assessment number as assigned and shown on the Assessment Diagram.

#### **Task 6.0 Final Assessment Spread**

Based on comments received from the NCSD staff and Committee members, WG will finalize the Assessment Spread and distribute to NCSD staff.

#### **Task 7.0 Outreach**

WG will meet with various District Staff and Committees through the first phase of this project. The anticipated meetings include the following:

- Staff Meetings – one meeting to discuss the Draft Engineer's Report
- NCSD Parks Committee Meeting – two meetings
- Community Workshop – two meetings
- NCSD Board Meeting – one meeting

#### **Task 8.0 Next Phase Preparation**

Upon direction from the NCSD Board, WG will define a Scope of Work for Phase II of the Funding District Formation.



**DELIVERABLES**

- Five copies of two letter reports
- Five copies of the Draft Assessment Spread
- Five copies of the Final Assessment Spread

**SERVICES NOT INCLUDED**

- Survey

**PROJECT FEES**

Wallace Group will perform the services denoted in Tasks 1.0 through 8.0 of the proposed Scope of Work in accordance with the attached Schedule of Fees (Exhibit A). These services will be invoiced monthly on an accrued cost basis, and our total fees, including reimbursables will not exceed our estimated fee of \$29,300 without receiving written authorization from the Client.

At your request, additional services to the Scope of Work will be performed by Wallace Group following the signature of our Contract Amendment or the initiation of a new contract.

In order to ensure a clear understanding of all matters related to our mutual responsibilities regarding this proposal, the attached Standard Terms and Conditions (Exhibit B) are considered a part of our proposal agreement. If this proposal meets with your approval, please sign where indicated and return one original to our office, which will serve as our notice-to-proceed.

We want to thank you for this opportunity to present our proposal for engineering services. If you would like to discuss this proposal in greater detail, please feel free to contact me.

Sincerely,

**WALLACE GROUP**, a California Corporation

Steven G. Tanaka, PE 49779  
Director of Water Resources

**TERMS AND CONDITIONS ACCEPTED:**

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Printed Name

\_\_\_\_\_  
Title

\_\_\_\_\_  
Date

Attachments  
tag: P007-2925, 60, std  
Exhibit A  
Exhibit B

THIS PROPOSAL IS VALID FOR 90 DAYS FROM THE DATE OF THIS DOCUMENT.

"Exhibit A"  
**Schedule of Fees**  
**Personnel Hourly Compensation**

**Engineering Services:**

Principal .....	\$147
Principal Civil Engineer .....	\$142
Director of Water Resources .....	\$131
Senior Civil Engineer I – II .....	\$121 - \$126
Civil Engineer I – III .....	\$105 - \$116
Senior Civil Designer .....	\$110
Senior Operations Consultant .....	\$ 94
Engineering Associate I – V .....	\$ 84 - \$110
Administrative Assistant I - III .....	\$ 58 - \$ 63
Intern I - III .....	\$ 49 - \$ 68

**Direct Expenses:**

Reimbursement of direct expenses incurred in connection with the project scope of work will be invoiced to the client. A handling charge of 15% may be added to the direct expenses listed below. Direct expenses include, but are not limited to the following:

- travel expenses (automobile/  
lodging/ meals)
- professional subconsultants
- county/city fees
- document copies
- long distance telephone/fax
- postage/delivery service
- special materials
- blueprints
- photographs

**Invoicing and Interest Charges:**

Invoices are submitted monthly on an accrued cost basis in accordance with this Fee Schedule. A finance charge of 1.5% per month (18% per annum) will be assessed on all balances that are thirty days past due.

**Fee Revisions:**

Wallace Group reserves the right to revise our Schedule of Fees on a semi-annual basis, and also to adjust hourly prevailing wage rates (up or down) as the State establishes rate changes. As authorized in advance by the client, overtime on a project will be billed at 1.3 times the normal employee's hourly rate.

**Personnel Classifications:**

Wallace Group may find it necessary to occasionally add new personnel classifications to our Schedule of Fees.

**Mileage:**

Wallace Group charges \$0.50 per mile.

"Exhibit B"  
Standard Terms and Conditions  
Project No. P007-2925  
Contract Agreement Date: April 24, 2007

Client: **NIPOMO COMMUNITY SERVICES DISTRICT**  
P.O. Box 326, Nipomo, California 93444-0326

Consultant: **WALLACE GROUP, A CALIFORNIA CORPORATION**  
4115 Broad Street, Suite B-5, San Luis Obispo, California 93401-7963

Client and Consultant agree that this Agreement, comprising pages 1 through 6, is the entire Agreement between the Client and the Consultant. It supersedes all prior communications, understandings and agreements, whether oral or written. Amendments to this Agreement must be in writing and signed by both the Client and the Consultant.

## ARTICLE 1. GENERAL PROVISIONS

### 1.1 Preamble

This Agreement is based upon a mutual obligation of good faith and fair dealing between the parties in its performance and enforcement. Accordingly, the CLIENT and the CONSULTANT, with a positive commitment to honesty and integrity, agree to the following:

That each will function within the laws and statutes that apply to its duties and responsibilities; that each will assist in the other's performance; that each will avoid hindering the other's performance; that each will work diligently to fulfill its obligations; and each will cooperate in the common endeavor of the contract.

### 1.2 Governing Law and Jurisdiction

The CLIENT and the CONSULTANT agree that this Agreement and any legal actions concerning its validity, interpretation and performance shall be governed by the laws of the State of California. It is further agreed that any legal action between the CLIENT and the CONSULTANT arising out of this Agreement or the performance of the services shall be brought in a court of competent jurisdiction in San Luis Obispo, California.

### 1.3 Precedence of Conditions

Should any conflict exist between the terms herein and the form of any purchase order or confirmation issued, the Terms and Conditions herein shall prevail in the absence of CONSULTANT'S express written conditions.

### 1.4 Standard of Care

In providing services under this Agreement, the CONSULTANT will endeavor to perform in a manner consistent with that degree of care and skill ordinarily exercised by members of the same profession currently practicing under similar circumstances.

### 1.5 Corporate Protection

It is intended by the parties to this Agreement that the CONSULTANT'S services in connection with the Project shall not subject the CONSULTANT'S individual employees, officers or directors to any personal legal exposure for the risks associated with

this Project. Therefore, and notwithstanding anything to the contrary contained herein, the CLIENT agrees that as the CLIENT'S sole and exclusive remedy, any claim, demand or suit shall be directed and/or asserted only against the CONSULTANT, a California corporation, and not against any of the CONSULTANT'S individual employees, officers or directors.

### 1.6 Confidentiality

The CONSULTANT agrees to keep confidential and not to disclose to any person or entity, other than the CONSULTANT'S employees, subconsultants and the general contractor and subcontractors, if appropriate, any data or information not previously known to and generated by the CONSULTANT or furnished to the CONSULTANT and marked CONFIDENTIAL by the CLIENT. These provisions shall not apply to information in whatever form that is in the public domain, nor shall it restrict the CONSULTANT from giving notices required by law or complying with an order to provide information or data when such order is issued by a court, administrative agency or other legitimate authority, or if disclosure is reasonably necessary for the CONSULTANT to defend itself from any legal action or claim.

### 1.7 Third-Party Beneficiaries

Nothing contained in this Agreement shall create a contractual relationship with or a cause of action in favor of a third party against either the CLIENT or the CONSULTANT. The CONSULTANT'S services under this Agreement are being performed solely for the CLIENT'S benefit, and no other party or entity shall have any claim against the CONSULTANT because of this Agreement or the performance or nonperformance of services hereunder. The CLIENT and CONSULTANT agree to require a similar provision in all contracts with contractors, subcontractors, subconsultants, vendors and other entities involved in this Project to carry out the intent of this provision.

### 1.8 Timeliness of Performance

The CLIENT and CONSULTANT are aware that many factors outside the CONSULTANT'S control may affect the CONSULTANT'S ability to complete the

services to be provided under this Agreement. The CONSULTANT will perform these services with reasonable diligence and expediency consistent with sound professional practices.

#### **1.9 Severability**

Any term or provision of this Agreement found to be invalid under any applicable statute or rule of law shall be deemed omitted and the remainder of this Agreement shall remain in full force and effect.

#### **1.10 Survival**

Notwithstanding completion or termination of this Agreement for any reason, all rights, duties and obligations of the parties to this Agreement shall survive such completion or termination and remain in full force and effect until fulfilled.

#### **1.11 Statutes of Repose and Limitation**

All legal causes of action between the parties to this Agreement shall accrue and any applicable statutes of repose or limitation shall begin to run not later than the date of Substantial Completion. If the act or failure to act complained of occurs after the date of Substantial Completion, then the date of final completion shall be used, but in no event shall any statute of repose or limitation begin to run any later than the date the CONSULTANT'S services are completed or terminated.

#### **1.12 Defects in Service**

The CLIENT shall promptly report to the CONSULTANT any defects or suspected defects in the CONSULTANT'S services of which the CLIENT becomes aware, so that the CONSULTANT may take measures to minimize the consequences of such a defect. The CLIENT further agrees to impose a similar notification requirement on all contractors in its CLIENT/Contractor contract and shall require all subcontracts at any level to contain a like requirement. Failure by the CLIENT and the CLIENT'S contractors or subcontractors to notify the CONSULTANT shall relieve the CONSULTANT of the costs or remedying the defects above the sum such remedy would have cost had prompt notification been given when such defects were first discovered.

#### **1.13 Jobsite Safety**

Neither the professional activities of the CONSULTANT, nor the presence of the CONSULTANT or its employees and subconsultants at a construction/project site, shall relieve the General Contractor of its obligations, duties and responsibilities including, but not limited to, constructions means, methods, sequence, techniques or procedures necessary for performing, superintending and coordinating the Work in accordance with contract documents and any health or safety precautions required by any regulatory agencies. The CONSULTANT and its personnel have no authority to exercise any control with their work or any health or safety programs or procedures. The CLIENT agrees that the General Contractor shall be solely responsible for jobsite safety, and warrants that this intent shall be carried out in the CLIENT'S

contract with the General Contractor. The CLIENT also agrees that the CLIENT, the CONSULTANT and the CONSULTANT'S subconsultants shall be indemnified by the General Contractor and shall be made additional insured under the General Contractor's policies of general liability insurance.

#### **1.14 Assignment: Subcontracting**

Neither CLIENT nor CONSULTANT shall assign its interest in this agreement without the written consent of the other. CONSULTANT may not subcontract any portion of the work to be performed hereunder without such consent.

#### **1.15 Force Majeure**

Any delay or default in the performance of any obligation of CONSULTANT under this agreement resulting from any cause(s) beyond CONSULTANT'S reasonable control shall not be deemed a breach of this agreement. The occurrence of any such event shall suspend the obligations of CONSULTANT as long as performance is delayed or prevented thereby, and the fees due hereunder shall be equitably adjusted.

#### **1.16 Disputes**

(a) Notwithstanding any other provision of this Agreement and except for the provisions of (b) and (c), if a dispute arises regarding CONSULTANT'S fees pursuant to this contract, and if the fee dispute cannot be settled by discussions between CLIENT and CONSULTANT, both the CLIENT and CONSULTANT agree to attempt to settle the fee dispute by mediation through the American Arbitration Association (or other mediation service) before recourse to arbitration. If mediation does not resolve the fee dispute, such dispute shall be settled by binding arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association, and judgment upon the award rendered by the Arbitrator(s) may be entered in any court having jurisdiction thereof.

(b) Subdivision (a) does not preclude or limit CONSULTANT'S right to elect to file an action for collection of fees if the amount in dispute is within the jurisdiction of the small claims court.

(c) Subdivision (a) does not preclude or limit CONSULTANT'S right to elect to perfect or enforce applicable mechanics lien remedies.

#### **1.17 Attorneys' Fees**

In the event of any litigation arising from or related to this Agreement or the services provided under this Agreement, the prevailing party shall be entitled to recover from the non-prevailing party all reasonable costs incurred, including staff time, court costs, attorneys' fees and all other related expenses in such litigation.

#### **1.18 Merger: Waiver: Survival**

Except as set forth in Article 3.6 above, this agreement constitutes the entire and integrated Agreement between the Parties hereto and

supersedes all prior negotiations, representations, and/or agreement, written or oral. One or more waiver of any term, condition, or other provision of this Agreement by either party shall not be construed as a waiver of a subsequent breach of the same or any other provisions. Any provision hereof which is legally deemed void or unenforceable shall not void this entire Agreement and all remaining provisions shall survive and be enforceable.

#### **1.19 Services by CLIENT**

CLIENT will provide access to site of work, obtain all permits, and provide all legal services in connection with the Project; CLIENT shall furnish, at the CLIENT'S expense, all information, requirements, reports, data, surveys and instructions required by this Agreement, unless specifically included in the Scope of Work. The CONSULTANT may use such information, requirements, reports, data, surveys and instructions in performing its services and is entitled to rely upon the accuracy and completeness thereof. CLIENT shall pay the costs of checking and inspection fees, zoning application fees, soil engineering fees, testing fees, surveying fees and all other fees, permits, bond premiums and all other changes not specifically covered by the terms of this agreement. The CLIENT shall furnish, at the CLIENT'S expense, all information, requirements, reports, data, surveys and instructions required by this Agreement, unless specifically included in the Scope of Work. The CONSULTANT may use such information, requirements, reports, data, surveys and instructions in performing its services and is entitled to rely upon the accuracy and completeness thereof.

#### **1.20 Retention**

If any portion of CONSULTANT'S fee is held in retention, such amount shall be released within thirty days after invoicing for completion of corresponding services. Interest shall be paid at the rate of 1.5% per month on any retention amounts not paid within this thirty-day period.

### **ARTICLE 2. DEFINITIONS**

#### **2.1 Salary Costs**

The direct salaries of all CONSULTANT'S personnel engaged on the project. Salary costs include the actual direct pay of personnel assigned to the project (except for routine secretarial and accounting services) plus payroll taxes, insurance, sick leave, holidays, vacation, and other direct fringe benefits.

#### **2.2 Direct Expenses**

Expenditures made by the CONSULTANT, its employees or its subconsultants in the interest of the Project. Applicable reimbursable direct expenses are defined on the attached Schedule of Fees.

### **ARTICLE 3. COMPENSATION**

#### **3.1 Payment Due**

Invoices shall be submitted by the CONSULTANT monthly, are due upon presentation and shall be considered past due if not paid in full within thirty (30) days of the invoice date.

#### **3.2 Interest**

If payment in full is not received by the CONSULTANT within thirty (30) calendar days of the invoice date, the invoices shall bear interest at one-and-one-half (1.5) percent (or the maximum rate allowable by law, whichever is less) of the past due amount per month, which shall be calculated from the invoice due date. Payment thereafter shall first be applied to accrued interest and then to the unpaid principal.

#### **3.3 Collection Costs**

If the CLIENT fails to make payments when due and the CONSULTANT incurs any costs in order to collect overdue sums from the CLIENT, the CLIENT agrees that all such collection costs incurred shall immediately become due and payable to the CONSULTANT. Collection costs shall include, without limitation, legal fees, collection agency fees and expenses, court costs, collection bonds and reasonable CONSULTANT staff costs at standard billing rates for the CONSULTANT'S time spent in efforts to collect. This obligation of the CLIENT to pay the CONSULTANT'S collection costs shall survive the term of this Agreement or any earlier termination by either party.

#### **3.4 Suspension of Services**

If the CLIENT fails to make payments when due or otherwise is in breach of this Agreement, the CONSULTANT may suspend performance of services upon thirty (30) calendar days' notice to the CLIENT. CONSULTANT shall have no liability whatsoever to the CLIENT for any costs or damages as a result of such suspension caused by any breach of this Agreement by the CLIENT. Upon payment-in-full by the CLIENT, CONSULTANT shall resume services under this Agreement, and the time schedule and compensation shall be equitably adjusted to compensate for the period of suspension plus any reasonable time and expense necessary for the CONSULTANT to resume performance.

#### **3.5 Termination of Services**

If the CLIENT fails to make payment to the CONSULTANT in accordance with the payment terms herein, this shall constitute a material breach of this Agreement and shall be cause for termination of this Agreement by the CONSULTANT.

#### **3.6 Set-Offs, Backcharges, Discounts**

Payment of invoices shall not be subject to any discounts or set-offs by the CLIENT, unless agreed to in writing by the CONSULTANT. Payment to the CONSULTANT for services rendered and expenses incurred shall be due and payable regardless of any subsequent suspension or termination of this Agreement by either party.

#### **3.7 Satisfaction with Services**

Payment of any invoice by the CLIENT to the CONSULTANT shall be taken to mean that the CLIENT is satisfied with the CONSULTANT'S services to the date of payment and is not aware of any deficiencies in those services.



### **3.8 Disputed Invoices**

If the CLIENT objects to any portion of any invoice, the CLIENT shall so notify the CONSULTANT in writing within fifteen (15) days of receipt of the invoice. The CLIENT shall identify in writing the specific cause of the disagreement and the amount in dispute and shall pay that portion of the invoice not in dispute in accordance with the other payment terms of this Agreement. Any dispute over invoiced amounts due which cannot be resolved within thirty (30) calendar days after presentation of invoice by direct negotiation between the parties shall be resolved within forty-five (45) calendar days in accordance with the Dispute Resolution provision of this Agreement. Interest as stated above shall be paid by the CLIENT on all disputed invoice amounts that are subsequently resolved in the CONSULTANT'S favor and shall be calculated on the unpaid balance from the invoice date.

### **3.9 Payments to the CONSULTANT**

Payments to the CONSULTANT shall not be withheld, postponed or made contingent on the construction, completion or success of the project or upon receipt by the CLIENT of offsetting reimbursement or credit from other parties who may have caused additional services or expenses. No withholdings, deductions or offsets shall be made from the CONSULTANT'S compensation for any reason unless the CONSULTANT has been found to be legally liable for such amounts.

### **3.10 Advance Payment: Withholding Work Product**

CONSULTANT reserves the right to require payment in advance for work estimated to be done during a given billing period. CONSULTANT, without any liability to CLIENT, reserves the right to withhold any services and work products herein contemplated pending payment of CLIENT'S outstanding indebtedness or advance payment as required by CONSULTANT. Where work is performed on a reimbursable basis, budget may be increased by amendment to complete the Scope of Work. CONSULTANT is not obligated to provide services in excess of the authorized budget.

## **ARTICLE 4. SERVICES, ADDITIONAL SERVICES, AND AMENDMENTS**

### **4.1 Definitions**

Services and work products not expressly or implicitly included with those specified in this agreement, as determined by CONSULTANT, are not covered by this agreement. Such services and work products will be provided only upon compliance with the procedures set forth in paragraphs 3.5 and 3.6 below.

### **4.2 Services During Construction**

Any construction inspection or testing provided by CONSULTANT is for the purpose of determining the contractor's compliance with the functional provisions of the project specifications only. CONSULTANT in no way guarantees or insures contractor's work nor assumes responsibility for methods or appliances

used by the contractor for job site safety or for contractor's compliance with laws and regulations. CLIENT agrees that in accordance with generally accepted construction practices the construction contractor will be required to assume sole and complete responsibility for job site conditions during the course of construction of the project including safety of all persons and property and that this responsibility shall be continuous and not be limited to normal working hours.

### **4.3 Soil Testing**

CONSULTANT makes no representations concerning soil conditions, and he is not responsible for any liability that may arise out of the making or failure to make soil surveys, or sub-surface soil tests, or general soil testing. It is the CLIENT'S responsibility to obtain a soils report upon which report CONSULTANT can rely.

### **4.4 Opinion of Probable Construction Costs**

In providing opinions of probable construction cost, the CLIENT understands that the CONSULTANT has no control over cost or availability of labor, equipment or materials, or over market conditions or the Contractor's method of pricing, and that the CONSULTANT'S opinions of probable construction costs are made on the basis of the CONSULTANT'S professional judgment and experience. CONSULTANT makes no warranty, express or implied, that bids or negotiated cost of the Work will not vary from the CONSULTANT'S opinion of probable construction cost.

### **4.5 Adjustment**

Additional services or work products resulting in an adjustment of CONSULTANT'S original estimated budget or fixed fee will be provided at CLIENT'S request upon execution of a written amendment to this agreement expressly referring to the same and signed by both parties.

## **ARTICLE 5. TERMINATION OF AGREEMENT**

### **5.1 Due to Default**

This agreement may be terminated by either party upon seven (7) days written notice should the other party fail substantially to perform in accordance with this agreement through no fault of the party initiating the termination.

### **5.2 Without Cause**

This agreement may be terminated by CLIENT upon at least fourteen (14) days written notice to CONSULTANT in the event that the project is abandoned.

### **5.3 Termination Adjustment : Payment**

If this agreement is terminated through no fault of the CONSULTANT, CONSULTANT shall be paid for services performed and costs incurred to the termination notice date, including reimbursable expenses due, plus an additional amount not to exceed ten percent (10%) of charges incurred to the termination notice date to cover services to orderly

close the work and prepare project files and documentation, plus any additional direct expenses incurred by CONSULTANT including but limited to cancellation of fees or charges. CONSULTANT will use reasonable efforts to minimize such additional charges.

## **ARTICLE 6. LIMITATION OF LIABILITY: WAIVER: WARRANTY**

### **6.1 Limitation of Liability**

In recognition of the relative risks 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 permitted by law, to limit the liability of the CONSULTANT to the CLIENT for any and all claims, losses, costs, damages of any nature whatsoever or claims expenses from any cause or causes, including attorneys' fees and costs and expert-witness fees and costs, so that the total aggregate liability of the CONSULTANT to the CLIENT shall not exceed \$50,000.00, or the CONSULTANT'S total fee for services rendered on this project, whichever is greater. It is intended that this limitation apply to any and all liability or cause of action however alleged or arising, unless otherwise prohibited by law.

### **6.2 Contractor and Subcontractor Claims**

The Client further agrees, to the fullest extent permitted by law, to limit the liability of the Consultant and the Consultant's officers, directors, partners, employees and subconsultants to all construction contractors and subcontractors on the Project for any and all claims, losses, damages of any nature whatsoever or claims expenses from any cause or causes, including attorneys' fees and costs and expert witness fees and costs, so that the total aggregate liability of the Consultant and the Consultant's subconsultants to all those named shall not exceed \$50,000.00, or the Consultant's total fee for services rendered on this Project, whichever is greater. It is intended that this limitation apply to any and all liability or cause of action however alleged or arising, unless otherwise prohibited by law.

### **6.3 Warranty**

CONSULTANT makes no warranty, either express or implied, as to his findings, recommendations, specifications, or professional advice, except that the work was performed pursuant to generally accepted standards of practice in effect at the time of performance.

If, during the term of this Agreement, circumstances or conditions that were not originally contemplated by or known to the CONSULTANT are revealed, to the extent that they affect the scope of services, compensation, schedule, allocation of risks or other material terms of this Agreement, the CONSULTANT may call for renegotiation of appropriate portions of this Agreement. The CONSULTANT shall notify the CLIENT of the changed conditions necessitating renegotiation, and the CONSULTANT and the CLIENT shall promptly and in good faith enter into

renegotiations of this Agreement to address the changed conditions. If terms cannot be agreed to, the parties agree that either party has the absolute right to terminate this Agreement, in accordance with the Termination Provision hereof.

If the scope of services pursuant to this agreement does not include on-site construction review, construction management, supervision of construction of engineering structures, or other construction supervision for this project, or if subsequent to this agreement CLIENT retains other persons or entities to provide such services, CLIENT acknowledges that such services will be performed by others and CLIENT will defend, indemnify and hold CONSULTANT harmless from any and all claims arising from or resulting from the performance of such services by other persons or entities except claims caused by the sole negligence or willful misconduct of CONSULTANT; and from any and all claims arising from or resulting from clarifications, adjustments, modifications, discrepancies or other changes necessary to reflect changed field or other conditions, except claims caused by the sole negligence or willful misconduct of CONSULTANT.

### **6.4 Interpretation**

Limitations on liability, waivers and indemnities in this Agreement are business understandings between the parties and shall apply to all legal theories of recovery, including breach of contract or warranty, breach of fiduciary responsibility, tort (including negligence), strict or statutory liability, or any other cause of action, provided that these limitations on liability, waivers and indemnities will not apply to any losses or damages that may be found by a trier of fact to have been caused by the CONSULTANT'S sole or gross negligence or the CONSULTANT'S willful misconduct. The parties also agree that the CLIENT will not seek damages in excess of the contractually agreed-upon limitations directly or indirectly through suites against other parties who may join the CONSULTANT as a third-party defendant. "Parties" means the CLIENT and the CONSULTANT, and their officers, directors, partners, employees, subcontractors and subconsultants.

### **6.5 Delays**

The CLIENT agrees that the CONSULTANT is not responsible for damages arising directly or indirectly from any delays for causes beyond the CONSULTANT'S control. For purposes of this Agreement, such causes include, but are not limited to, strikes or other labor disputes; severe weather disruptions or other natural disasters; fires, riots, war or other emergencies or acts of God; failure of any government agency to act in a timely manner; failure of performance by the CLIENT of the CLIENT'S contractors or CONSULTANT'S; or discovery of any hazardous substances or differing site conditions.

## **ARTICLE 7. HAZARDOUS WASTE MATERIALS**

### **7.1 Liability**

CONSULTANT hereby states and CLIENT hereby

acknowledges that CONSULTANT has no professional liability insurance for claims arising out of the performance of or failure to perform professional services, including, but not limited to the preparation of reports, designs, drawings and specifications, related to the investigation, detection, abatement, replacement, use or specification, or removal of products, materials or processes containing substances including, but not limited to asbestos, toxic or hazardous waste, PCBs, combustible gases and materials, petroleum or radioactive materials (as each of these is defined in applicable federal statutes) or any other substances under any conditions and in such quantities as would pose a substantial danger to persons or property exposed to such substances at or near the Project site. Accordingly, the CLIENT hereby agrees to bring no claim for negligence, breach of contract indemnity or otherwise against the CONSULTANT, its principals, employees, and agents if such claim, in any way, would involve the CONSULTANT'S services for the investigation, detection, abatement, replacement, use or specification, or removal of products, materials or processes containing asbestos, asbestos cement pipe, and/or hazardous waste materials. CLIENT further agrees to defend, indemnify and hold harmless CONSULTANT, its officers, directors, principals, employees and agents from any asbestos and/or hazardous waste material related claims that may be brought by third parties as a result of the services provided by the CONSULTANT pursuant to this agreement except claims caused by the sole negligence or willful misconduct of the CONSULTANT.

## **ARTICLE 8. OWNERSHIP AND REUSE OF DOCUMENTS**

### **8.1 CONSULTANT Ownership**

All original papers, documents, drawings, electronic media and other work product of CONSULTANT, and copies thereof, produced by CONSULTANT pursuant to this agreement shall remain the property of CONSULTANT and may be used by CONSULTANT without the consent of CLIENT. Upon request and payment of the costs involved, CLIENT is entitled to a copy of all papers, documents and drawings provided CLIENT'S account is paid current.

### **8.2 Document Reuse**

In the event the CLIENT, the CLIENT'S contractors or subcontractors, or anyone for whom the CLIENT is legally liable makes or permits to be made any changes to any reports, plans specifications or other construction documents prepared by the CONSULTANT without obtaining the CONSULTANT'S prior written consent, the CLIENT shall assume full responsibility for the results of such changes. Therefore the CLIENT agrees to waive any claim against the CONSULTANT and to release the CONSULTANT from any liability arising directly or indirectly from such changes. In addition, the CLIENT agrees, to the fullest extent permitted by law, to indemnify and hold harmless the CONSULTANT from any damages, liabilities or costs, including reasonable attorneys' fees and costs of defense, arising from such

changes. In addition, the CLIENT agrees to include in any contracts for construction appropriate language that prohibits the contractor or any subcontractors of any tier from making any changes or modifications to the CONSULTANT'S construction documents without the prior written approval of the CONSULTANT and further requires the contractor to indemnify both the CONSULTANT and the CLIENT from any liability or cost arising from such changes made without proper authorization.

### **8.3 Electronic Media Alteration and Reuse**

Because CADD information stored in electronic form can be modified by other parties, intentionally or otherwise, without notice or indication of said modifications, CONSULTANT reserves the right to remove all indicia of its ownership and/or involvement in the material from each electronic medium not held in its possession. CLIENT shall retain copies of the work performed by CONSULTANT in CADD form only for information and use by CLIENT for the specific purpose for which CONSULTANT was engaged. Said materials shall not be used by CLIENT, or transferred to any other party, for use in other projects, additions to the current project, or any other purpose for which the material was not strictly intended by CONSULTANT without CONSULTANT'S express written permission. Unauthorized modification or reuse of the materials shall be at CLIENT'S sole risk, and CLIENT agrees to defend, indemnify, and hold CONSULTANT harmless, from all claims, injuries, damages, losses, expenses, and attorney's fees arising out of the unauthorized modification or use of these materials.

## **ARTICLE 9. CONDOMINIUM PROJECTS**

### **9.1 Condominium Conversion**

The CLIENT does not now expect this project will be converted into condominiums. Because this project will not be designed for condominium ownership, the CLIENT agrees that if, the CLIENT decides to convert the project into condominiums in the future, the CLIENT will, to the fullest extent permitted by law, indemnify and hold harmless the CONSULTANT, its officers, directors, employees, and subconsultants (collectively, CONSULTANT) against all damages, liabilities or costs, including reasonable attorneys fees and defense costs, arising out of or in any way connected with the conversion to condominium ownership, except for the sole negligence or willful misconduct of the CONSULTANT.

TO: BOARD OF DIRECTORS  
FROM: BRUCE BUEL *BB*  
DATE: JUNE 22, 2007

**AGENDA ITEM  
D-6  
JUNE 27, 2007**

CONSTRUCTION MANAGEMENT SERVICES POLICY

**ITEM**

Adopt policy regarding retention of construction management services [RECOMMEND ADOPTION].

**BACKGROUND**

Your Honorable Board, on June 13, 2007, discussed policy options regarding retention of construction management services and directed staff to prepare a policy based on the consensus of the Board at that meeting. Attached is a draft policy prepared by staff and reviewed by District Legal Counsel. As detailed in the policy, staff is proposing to use a the design firm for most projects under \$500,000; to use a separate firm for projects over \$1 million and to allow the General Manager to pick either approach for projects between \$500,000 and \$1 million.

Agencies use both approaches and there are advantages and disadvantages to each. The principal reason that agencies separate the functions is to ensure that the agency has an independent expert to resolve problems resulting from design errors. The principal reason that agencies combine the functions is that it is often more cost-effective and it minimizes staff time in seeking quotes from CM firms.

**RECOMMENDATION**

Staff recommends that your Honorable Board adopt the attached policy and direct staff to implement.

**ATTACHMENT**

- Draft Policy

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**NCSD POLICY**  
**REGARDING**  
**RETENTION OF CONSTRUCTION MANAGEMENT SERVICES**  
**JUNE 27, 2007**

Subject to Board action directing otherwise, this policy shall apply to all NCSD Public Works Projects subject to formal bids:

1. For public works projects expected to cost \$500,000 or less, the General Manager shall structure the design agreement such that the design professional performs design, construction management and engineering services during construction, unless the work is so complicated that it is not prudent for one firm to perform all three services.
2. For public works projects expected to cost \$1,000,000 or more, the General Manager shall structure the design agreement such that the design professional performs design and engineering services during construction and that a separate agreement is executed with a construction management firm other than the design firm to perform construction management.
3. For public works projects expected to cost between \$500,000 and \$1,000,000, the General Manager may choose either option 1 or option 2 above, depending on the complexity of the project.

TO: BOARD OF DIRECTORS  
FROM: BRUCE BUEL *BB*  
DATE: JUNE 22, 2007



ACCEPTANCE OF WATER AND SEWER IMPROVEMENTS  
CO 03-0089 (HONEY GROVE IV-NEWDOLL)

**ITEM**

Acceptance of water and sewer improvements for CO 03-0089 (Honey Grove IV-Newdoll)

**BACKGROUND**

Upon completion of a developer's project, the District accepts improvements of the project after all requirements have been met. The developer for CO 03-0089, a 10-lot development on Honey Grove, has installed water and sewer improvements and has met the District's conditions:

- Installed the improvements
- Paid associated fees
- Provided the necessary paperwork, including the Offer of Dedication and the Engineer's Certification

**RECOMMENDATION**

Staff recommends that your Honorable Board adopt the following Resolution 2007 – Honey Grove accepting the water and sewer improvements for CO 03-0089.

**ATTACHMENT**

Resolution 2007- Honey Grove

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**NIPOMO COMMUNITY SERVICES DISTRICT  
RESOLUTION NO. 2007-HONEY GROVE**

**A RESOLUTION OF THE BOARD OF DIRECTORS  
OF THE NIPOMO COMMUNITY SERVICES DISTRICT  
ACCEPTING THE WATER AND SEWER IMPROVEMENTS  
FOR CO 03-0089 (HONEY GROVE IV-NEWDOLL)**

**WHEREAS**, the District approved the construction plans on September 30, 2004, for the water and sewer improvements to be constructed; and

**WHEREAS**, the water and sewer improvements have been constructed and said improvements are complete and certified by the engineer; and

**WHEREAS**, on June 13, 2007, the Owner offered the water and sewer improvements to the Nipomo Community Services District; and

**WHEREAS**, this District has accepted such offer without obligation except as required by law, and

**WHEREAS**, all water and sewer fees for service, required in conformance with District ordinances, have been paid in full for CO 03-0089 (Honey Grove IV-Newdollar).

**NOW, THEREFORE, BE IT RESOLVED, DETERMINED AND ORDERED BY THE BOARD OF DIRECTORS OF THE NIPOMO COMMUNITY SERVICES DISTRICT AS FOLLOWS:**

That the water and sewer improvements to serve CO 03-0089 in Nipomo are accepted by this District.

On the motion by Director \_\_\_\_\_, seconded by Director \_\_\_\_\_, and on the following roll call vote, to wit:

AYES:  
NOES:  
ABSENT:  
ABSTAIN:

the foregoing resolution is hereby adopted this 27<sup>th</sup> day of June, 2007.

\_\_\_\_\_  
Michael Winn, President  
Nipomo Community Services District

ATTEST:

APPROVED AS TO FORM:

\_\_\_\_\_  
Donna K. Johnson  
Secretary to the Board

\_\_\_\_\_  
Jon S. Seitz  
General Counsel