

RESOLUTION NO. 17- 107

Resolution Of The City Council Of The City Of Emeryville Authorizing The City Manager To Enter Into A Professional Service Agreement With Rubicon Enterprises Inc., DBA Rubicon Landscape In An Amount Not To Exceed \$209,536 For City-Wide Landscape Maintenance For Fiscal Year 2017-18

WHEREAS, the City contracts for the maintenance of landscaping at all City facilities, various City parks, median islands and greenways throughout the City; and

WHEREAS, on April 11, 2017, the City issued an RFP for City-wide Landscape Maintenance; and

WHEREAS, on May 4, 2017, the City received three proposals for City-wide landscape maintenance; and

WHEREAS, staff reviewed the proposals for responsiveness, qualifications, reasonableness of the schedule of billing rates, and for the Proposer's understanding of the work to be completed and identified Rubicon Landscape as the best qualified; and

WHEREAS, for four additional fiscal years (FY) the contract provides for the contractor to be awarded a cost of living adjustment based on the Consumer Price Index, to a maximum of 5% per year; and

WHEREAS, for FY 2017-18, Rubicon Landscape is proposing to provide routine landscaping services for an annual total cost of \$129,536; and

WHEREAS, for FY 2017-18, an allowance of \$80,000 is included in the contract to cover much needed re-planting, heavy pruning and other improvements to help bring the landscaped areas back to expected standards and other unanticipated irrigation system, vandalism repair, and maintenance on CALTRANS right-of-ways; and

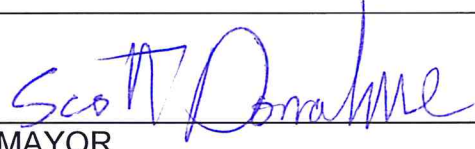
WHEREAS, for FY 2017-18, the contract is in an amount not to exceed \$209,536; and

WHEREAS, the approved operating budget for fiscal year 2017-18 includes sufficient funds to cover the cost of landscape maintenance; now, therefore be it

RESOLVED, that the City Council of the City of Emeryville hereby authorizes the City Manager to enter into a Professional Service Agreement with Rubicon Enterprises Inc., DBA Rubicon Landscape in an amount not to exceed \$209,536 for City wide landscape maintenance for FY 2017-18, a copy of which is attached hereto as Exhibit "A".

ADOPTED, by the City Council of the City of Emeryville at a regular meeting held Tuesday, June 20, 2017, by the following vote:

AYES:	<u>5</u>	Mayor Donahue, Vice Mayor Bauters and Council Members Martinez, Medina and Patz
NOES:	<u>0</u>	
ABSTAIN:	<u>0</u>	
ABSENT:	<u>0</u>	


MAYOR

ATTEST:


CITY CLERK

APPROVED AS TO FORM:


CITY ATTORNEY

MAINTENANCE CONTRACT

This Contract is made and entered into this ____ day of _____, 2017,
between **CITY OF EMERYVILLE**, a municipal corporation ("City") and __Rubicon
Enterprises, Inc., dba Rubicon Landscape, a California Corporation, ("Contractor");

W I T N E S S E T H:

WHEREAS, _Rubicon Landscape of _Richmond , California submitted a proposal for designated services in connection with the FY 2017/2018 Citywide Landscape Maintenance Proposal, Project EPW 17-108 and

WHEREAS, _Rubicon Landscape is a Landscape Contractor holding California Contractor's License No _750715_, which is a valid Class _C27_ license, as well as having Bay-Friendly Qualified Landscape Professionals on staff and assigned to the City of Emeryville; and

WHEREAS, City has determined that Contractor is qualified by training and experience to render such services; and

NOW, THEREFORE, the parties mutually agree as follows:

A. **AWARD OF CONTRACT**

1. **Contract Documents**

The Contract Documents shall include this Contract and any Plans and Specifications, Notice to Contractors, Contractor's Proposal, Addenda and Change Orders. In the event of any conflict between the printed provisions of this Contract and those of Contractor's offer of acceptance, the provision of this Contract shall prevail.

2. **Scope of Work**

In conformance with the Contract Documents, Contractor shall perform, or cause to be performed, the Routine Monthly Landscape Maintenance as described in this Agreement (hereinafter "Work"), to the satisfaction of the City. The Scope of Work is more particularly described in the Bid Documents for Project No. EPW 17-108.

FOR CITY USE ONLY			
Contract #:		CIP #:	
Reso. #:		EPW #:	

The City reserves its right to contract with others to perform any work specified in this section A.2. This Agreement does not guarantee that the Contractor will be called to work for every landscape repair, replacement, or refurbishment that is performed in the City during the life of this Agreement.

In conformance with the Contract Documents, Contractor will furnish all labor, materials, services, transportation, appliances, and mechanical workmanship and disposal required in order to provide scheduled maintenance services as described in Exhibit A, attached hereto.

Any quantities for work are estimates. The City does not guarantee any level of work under this Contract. The City, in its discretion, reserves the right to hire or contract with others to do the work set forth in the Contract.

3. Price

- a. The Contractor shall be compensated for Routine Monthly Landscape Maintenance in accordance with the monthly rates set forth in the Bid Sheet in the Contractor's Proposal. The specified compensation will stay in effect for the duration of this Contract. Should the Contractor fail to perform the work in any of the areas listed in the Proposal and/or identified as defined, it shall be deemed that Routine Maintenance for that area for the month has not been performed. The rate for that location for that month will not be paid.
- b. Overtime rates for Additional Work shall be charged, if any, only on weekdays from 4:30 p.m. to 8:00 a.m., Saturdays, Sundays, and all national holidays. Overtime shall be charged only for the actual time spent at the work site in fifteen (15) minute intervals as approved in advance in writing by the City.
- c. The total amount to be paid under this Contract for all of the work set forth in Section 2 above is \$209,536 US DOLLARS (\$\$\$\$\$\$) ("Total Compensation"). An allowance in an amount not to exceed \$80,000 is included in the Total Compensation for extra work or repairs as described in the Bid Documents should it be needed. The Contractor shall not perform any extra work unless approved in writing by the City.

4. Payment

Contractor shall invoice City not more frequently than once a month for the services performed. Compensation shall be paid to Contractor upon receipt and approval by City of invoices setting forth in detail the services performed. City shall pay Contractor within forty-five (45) days after approval of the invoice by City staff.

5. **Term**

This Contract shall be effective from July 1, 2017 and shall terminate on June 30, 2018.

6. **Option to Renew Contract**

At the option of the City, the City may enter into new contracts with the Contractor for fiscal years, 2018/2019 through 2021/2022 under the terms and conditions of this contract. This option must be exercised by City by providing written notice of the City's intent to exercise said option to Contractor at least 30 days prior to the expiration of the term of this Contract. The Contractor shall be entitled to increase its rates at a percentage no greater than the percent increase in the March to March San Francisco/Oakland Metropolitan Area Consumer Price Index as released by the United States Department of Labor on a yearly basis with a maximum inflation increase of 5% per year.

B. **PROSECUTION OF WORK**

1. **Change Orders**

City may, without notice to the sureties, and without invalidating the Contract, at any time: a) make alterations, deviations, additions to or deletions from the Contract Documents; b) increase or decrease the quantity of any item or portion of the work; c) delete any item or portion of the work; or d) require extra work, as determined by City to be necessary or advisable. All such work shall be performed under applicable provisions of the Contract Documents, unless specifically provided otherwise at the time the change is ordered.

Any such changes will be set forth in a written Change Order issued by City. The Change Order will specify:

- a. the work to be done in connection with the change to be made;
- b. the amount of the adjustment of the Contract price, if any, and the basis for compensation for the work ordered; and
- c. the extent of the adjustment in the Contract time, if any.

A Change Order shall not become effective until it has been signed by the Director of Public Works. Upon receipt of an approved Change Order, Contractor shall promptly proceed with the ordered work, unless otherwise provided in the approved Change Order.

No changes or deviations from the Contract Documents shall be made without the authority of an approved Change Order, except that in cases of emergency the Director of Public Works may direct a change in writing. A Change Order increasing the total compensation under the Contract requires a written amendment to the Contract.

Whenever it appears to Contractor that a change is necessary, Contractor shall immediately notify the Director of Public Works of the change it believes necessary and the reasons for such change; however, work in the area affected shall not be discontinued unless ordered by the Director of Public Works.

2. Differing Site Conditions

Contractor shall promptly, and before such conditions are disturbed, notify the Director of Public Works in writing of:

- a) material that Contractor believes may be material that is hazardous waste, as defined in California Health and Safety Code Section 25117, that is required to be removed to a Class I, Class II or class III disposal site in accordance with provisions of existing law;
- b) subsurface or latent physical conditions differing materially from those indicated in this Contract; or
- c) unknown physical conditions, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inherent in work of the character provided for in this Contract.

The Director of Public Works shall promptly investigate the conditions. If the Director of Public Works finds that such conditions do materially differ and cause an increase or decrease in Contractor's cost of, or the time required for, performance of any part of the work under this Contract, whether or not changed as a result of such conditions, an equitable adjustment shall be made and the Contract modified in accordance with the change order procedures set forth herein.

In the event of any dispute between City and Contractor over the significance or existence of the changed conditions, Contractor shall not be excused from the scheduled completion date set forth herein, but shall retain such rights it may have as provided in these Contract Documents.

No claim of Contractor under this clause shall be allowed unless Contractor has given the notice required by this section, except that City may extend the prescribed time. No claim by Contractor for an equitable adjustment under this provision shall be allowed if asserted after final payment under this Contract.

3. Public Convenience

Contractor shall so conduct its operations as to offer the least possible obstruction and inconvenience to the public and it shall have under construction no greater length or amount of work than it can prosecute properly with due regard to the rights of the public. Maintenance operations shall be conducted in such a manner as to cause as little inconvenience as possible to owners of abutting property. Convenient access to

driveways, houses and buildings along the line of work shall be maintained, and temporary approaches to roads or highways shall be provided and kept in good condition.

4. Traffic Control Measures.

Contractor shall provide appropriate vehicular, pedestrian and bicycle traffic control measures.

a. Where facilities exist, a minimum sidewalk and bikepath width of four (4) feet shall be maintained at all times for safe passage through the work area. At no time shall pedestrians be diverted onto a portion of the street used for vehicular traffic. At locations where adjacent alternate walkways cannot be provided, appropriate signs and barricades shall be installed at the limits of the construction site and in advance of the closure of the nearest crosswalk or intersection to divert pedestrians across the street. Access shall be maintained for persons with disabilities.

b. All work shall be planned and carried out so that there is least possible inconvenience to vehicular traffic, including deliveries to adjacent properties. Warning signs, lights and safety devices and other measures shall conform to the requirements of the Manual of Traffic Controls issued by Caltrans. Traffic control for day or nighttime lane closures (if nighttime work is permitted) shall be in conformance with the Caltrans Standard Plans for Traffic Control Systems. Contractor is authorized to place properly attired flagger(s) to stop and warn traffic. Traffic shall not be unreasonably delayed. Flagging procedures shall be in conformance with the Instructions to Flaggers pamphlet and/or Manual of Traffic Controls for Construction and Maintenance Work Zones issues by Caltrans.

5. Air Pollution Control

Contractor shall comply with all air pollution control rules, regulations, ordinances and statutes which apply to any work performed pursuant to the Contract. Material to be disposed of shall not be burned, either inside or outside the work site.

6. Water Pollution Control

Contractor shall exercise every reasonable precaution to protect streams, lakes, reservoirs, bays and coastal waters from pollution with fuels, oils, bitumens, calcium chloride and other harmful materials and shall conduct and schedule its operations so as to avoid or minimize muddying and silting of said streams, lakes, reservoirs, bays and coastal waters. Care shall be exercised to preserve roadside vegetation beyond the limits of construction.

7. Storm Water Pollution Prevention Standards

Contractor shall comply with City's Storm Water Pollution Prevention standards at all times during operation of this contract by incorporating current Best Management Practices (BMP) for use during the work.

8. **Sound Control Requirements**

Contractor shall comply with all local sound control and noise level rules, regulations and ordinances which apply to any work performed pursuant to the Contract. Each internal combustion engine, used for any purpose on the job or related to the job, shall be equipped with a muffler of a type recommended by the manufacturer.

9. **Weight Limitations**

Unless expressly permitted by the Director of Public Works, Contractor shall not operate construction equipment or vehicles of any kind which, laden or unladen, exceed the maximum weight limits set forth in Division 15 of the California Vehicle Code over completed or existing base, surfacing, pavement or structures.

10. **Safety Requirements**

Contractor shall comply with all safety requirements prescribed by applicable federal, state and local laws and regulations to ensure the safety and health of those working and the local community. Contractor shall assume all responsibility for public safety during the prosecution of the work and all such costs shall be included in the Contract price. Whenever Contractor's operations create a condition hazardous to traffic or to the public, it shall furnish, erect and maintain, at its expense, such fences, barricades, lights, signs and other devices and take such other protective measures as are necessary to prevent accidents or damage or injury to the public.

11. **Inspection**

All authorized representatives of City shall have access to the work. Work and materials not meeting the requirements of City shall be corrected, and unsuitable work or material may be rejected. Failure on City's part to reject nonconforming work shall not be construed to imply acceptance of such work. Observation by City of the work shall not relieve Contractor of its responsibility to conduct its own comprehensive inspections of the work and to furnish materials and perform work in accordance with the Contract Documents.

12. **Termination**

City shall have the right to terminate Contractor's right to proceed with some or all of the work and may terminate this Contract for default by providing written notice thereof at least five (5) calendar days in advance of the termination date. The term "default" includes, but is not limited to: a) performance of work in violation of the terms of the Contract or other applicable law, order, regulation, permit or requirement; b) abandonment; c) assignment or subletting without City approval; d) bankruptcy or appointment of a receiver for Contractor's property; e) refusal or failure to properly prosecute the work; f) use of materials, supplies, plant or equipment of improper quality or quantity; g) refusal or failure to use an adequate number of properly skilled workers; h) failure to provide proper workmanship; i) failure to take effective steps to end a labor

dispute; j) performance of this Contract in bad faith or k) failure to pay subcontractors. Upon such termination, City shall have the right to complete the work, or the portion involved, by whatever means and methods it deems expedient, at the Contractor's expense which the City can deduct from any amounts due Contractor. City at its sole discretion may withhold any payment otherwise due Contractor until completion and final settlement of the work covered by the notice of default.

City may also terminate the Contract for convenience if in the best interests of City upon thirty (30) calendar days' notice in advance. In such event, Contractor shall be paid for all substantiated direct costs of materials furnished and work performed up to the date of termination any additional compensation that City deems reasonable.

Upon receipt of a notice of termination, Contractor shall: a) stop all work unless directed otherwise; b) take such action to protect materials from damage; c) notify all subcontractors and suppliers that Contract is terminated; d) provide City with inventory list of materials previously produced, purchased or ordered and not yet used in the work; e) dispose of all materials not used on the work as directed by City; f) if directed by City, assign all rights and interests of Contractor under subcontracts or orders for the project; g) furnish any required documentation; and h) take any other actions as City may direct.

13. Subsurface Excavations; Notification

Attention is directed to Government Code Sections 4216 to 4216.9, and in particular Section 4216.2 which provides, in part: "Except in an emergency, every person planning to conduct any excavation shall contact the appropriate regional notification center at least two working days, but no more than 14 calendar days, prior to commencing that excavation, if the excavation will be conducted in an area which is known, or reasonably should be known, to contain subsurface installations other than the underground facilities owned or operated by the excavator, and, if practical, the excavator shall delineate with white paint or other suitable markings the area to be excavated.

The regional notification center shall provide an inquiry identification number to the person who contacts the center and shall notify any member, if known, who has a subsurface installation in the area of the proposed excavation."

"Contractor shall contact the regional notification center, "Underground Service Alert / 811," and schedule the work to allow ample time for the center to notify its members and, if necessary, for any member to field locate and mark its facilities."

14. Trench Excavation Safety Plan

Attention is directed to California Labor Code, Section 6705. At least five (5) days in advance of excavation of any trench five feet or more in depth, Contractor shall submit to the Director of Public Works a detailed plan showing the design of shoring, bracing, sloping and other provisions to be made for worker protection from the hazard of caving ground during the excavation of such trench or trenches. If such plan varies from the shoring system standards established by the State Construction Safety Orders, the plan shall be prepared and signed by a registered civil or structural engineer.

Nothing in this section shall be deemed to allow the use of a shoring, sloping or protective system less effective than that required by the Construction Safety Orders of

the Division of Industrial Safety. Nothing in this section shall be construed to impose liability on City or its employees or agents.

C. **CONTRACTOR'S RESPONSIBILITIES**

1. **Responsibility for Damage**

Contractor shall be responsible for any loss or damage that may happen to the work; for any loss or damage to any of the materials of other things used or employed in performing the work; for injury to or death of any person (including but not limited to workers or the public) from any cause whatsoever; or damage to property from any cause whatsoever.

Contractor shall indemnify, defend and save harmless City, and their officials, officers, employees, volunteers and agents against all suits, claims or losses (including attorneys' fees and expenses) that may be based on any injury or damage to, or death of any person or any damage to property that may occur, or that may be alleged to have occurred, arising from the performance of this Contract by Contractor, its subcontractors or employees, whether or not it shall be claimed that the injury was caused through a negligent act or omission of Contractor, its subcontractors, employees or other agents, except for the sole negligence or willful misconduct of City. Contractor shall, at its own expense, pay all charges of attorneys and all cost and other expenses arising or incurred in connection with such suits, claims or losses. If any judgment shall be rendered against City in connection with any such suit, claim or loss, Contractor shall at its own expense satisfy and discharge it.

2. **Insurance**

Contractor shall procure and maintain for the duration of the Contract insurance against claims for injuries to persons or damages to property of the work hereunder by Contractor, his agents, representatives, and employees.

a. **Minimum Scope and Limits of Insurance.** Coverage shall be placed with insurers admitted in California with a current A.M. Best's rating of not less than A: VII:

(1) Contractor shall maintain general liability insurance with limits no less than \$2,000,000 per occurrence for bodily injury, personal injury and property damage. If Commercial General Liability Insurance or other form with a general aggregate limit is used, either the general aggregate limit shall apply separately to this project/location or the general aggregate limit shall be twice the required occurrence limit.

(2) Contractor shall maintain automobile liability insurance with limits of no less than \$2,000,000 per accident for bodily injury and property damage.

(3) Workers' Compensation limits as required by the Labor Code of the State of California and Employers Liability limits of no less than \$2,000,000 per accident.

b. **Other Insurance Provisions.**

(1) As to the general liability and automobile liability insurance policies, the City and their officers, officials, employees, agents and volunteers are to be covered as additional insured pursuant to an endorsement to the policy. The coverage shall contain no special limitations on the scope of protection afforded to City, and their officers, officials, employees, agents or volunteers.

(2) For any claims related to this project, Contractor's insurance coverage shall be endorsed to be primary insurance as respects City, and their officers, officials, employees, agents or volunteers. Any insurance or self-insurance maintained by City of Emeryville, and their officers, officials, employees, agents or volunteers shall be excess of Contractor's insurance and shall not contribute with it.

(3) For worker's compensation coverage, the insurer agrees by endorsement to waive all rights of subrogation against City, and their officials, employees, and volunteers for losses arising from the work.

(4) Any failure to comply with reporting or other provisions of the policies including breaches of warranties shall not affect coverage provided to City of Emeryville, its officers, officials, employees, agents or volunteers.

(5) Contractor's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respects to the limits of the insurer's liability.

(6) Each insurance policy required by this clause shall be endorsed to state that coverage shall not be suspended, voided, canceled by either party, reduced in coverage or in limits except after thirty (30) days' prior written notice by certified mail, return receipt requested has been given to City.

(7) Any deductibles or self-insured retentions must be declared to and approved by City.

3. **Payment of Taxes**

The Contract prices paid for the work shall include full compensation for all taxes which Contractor is required to pay, whether imposed by Federal, State or local government, including, without being limited to, Federal excise tax. No tax exemption certificate nor any document designed to exempt Contractor from payment of any tax will be furnished to Contractor by City, as to any tax on labor, services, materials, transportation, or any other items furnished pursuant to the Contract. Contractor shall withhold and pay any and all sales and use taxes, withholding taxes, whether State or Federal, Social Security taxes, State Unemployment Insurance charges and all other taxes which are now or hereafter may be required to be paid or withheld under any laws.

To the extent reasonably feasible, Contractor will use sales tax reporting procedures which will provide City of Emeryville the greatest benefit from California sales/use tax revenue. Such procedures may include, when applicable, designating City

of Emeryville as the point of sale/use of product where there is no clearly determinable point of sale/use, self-reporting tax on out of state purchases of goods used in City of Emeryville and reporting City of Emeryville as the origin of construction costs as allowed by the State Board of Equalization pursuant to their December 1994, Resolution pertaining to allocation of local tax by construction contractors. Notwithstanding the above, Contractor shall not be obligated to adopt any procedures pursuant to this section if such procedures result in significantly increased costs to Contractor (including loss of profits or risk of liability for taxes in multiple jurisdictions), or if such procedures are contrary to the sales and use tax laws or regulations of California or any other state.

4. **Permits and Licenses**

Contractor covenants and declares that it has obtained all diplomas, certificates, licenses, permits or the like required of Contractor by any and all national, state, regional, county, city or local boards, agencies, commissions, committees or other regulatory bodies in order to perform the services contracted for under this Contract. Contractor shall comply with all permits applicable to the work. Contractor has and shall maintain the appropriate State Contractor's License, pursuant to Chapter 9 of Division 3 of the California Business and Professions Code.

Contractor has and shall maintain a current Business License with City of Emeryville during the term of this contract. Contractor shall insert in each of its subcontract Contracts a provision which requires its subcontractors to present proof that the subcontractor has obtained a current Business License with City of Emeryville during the term of this contract.

The California Environmental Quality Act (Public Resources Code, Section 21000 to 21176) may be applicable to permits, licenses and other authorizations which Contractor must obtain from State or local agencies in connection with performing the work of the Contract. Contractor shall comply with the provisions of that Act in obtaining such permits, licenses and other authorizations and they shall be obtained in sufficient time to prevent delays to the work.

5. **Labor Code Requirements**

To the extent the services to be provided by Contractor pursuant to this Agreement constitutes "public work" as defined in Labor Code Section 1720, Contractor shall pay and shall ensure that all subContractors or subcontractors pay all persons providing labor to perform the work under this Agreement applicable prevailing wage rates for the work to be performed as determined in the General Prevailing Wage Determination ("Wage Determination") made by the Director of Industrial Relations pursuant to California Labor Code sections 1770, 1773, et. seq., and otherwise comply with all provisions of this Section IV.N. A copy of the applicable Wage Determination is on file in the offices of the City.

Contractor is required to comply with the following provisions and to insure that all subcontracts include the following provisions. If, for some reason, these provisions are not included in subcontracts, they shall nevertheless apply:

a. Hours of Labor. Eight hours labor constitutes a legal day's work. Contractor shall forfeit, as penalty to City, Twenty-Five Dollars (\$25) for each worker employed in the performance of the Contract by Contractor or by any subcontractor under him for each calendar day during which such workman is required or permitted to work more than eight (8) hours in any one (1) day and forty (40) hours in any one calendar week in violation of the provisions of the California Labor Code and in particular, Sections 1810 to 1815 thereof, inclusive, except that work performed by employees of Contractor in excess of eight (8) hours per day and forty (40) hours during any one (1) week shall be permitted upon compensation for all hours worked in excess of eight hours per day at not less than one and one-half (1-1/2) times the basic rate of pay, as provided in said Section 1815.

b. Labor Non-Discrimination. Attention is directed to Section 1735 of the Labor Code which provides Contractor shall not discriminate against any employee who is employed on the work because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status or sex of such persons, except as provided in Section 12940 of the Government Code.

c. Prevailing Wages. Contractor shall comply with California Labor Code Sections 1770 to 1780, inclusive. In accordance with said Section 1775, Contractor shall forfeit as a penalty to an amount determined by the Labor Commissioner, not to exceed Fifty Dollars (\$50) for each calendar day or portion thereof for each worker paid less than stipulated prevailing wage rates for such work or craft in which such worker is employed for any work done under the Contract by him or by any subcontractor under him in violation of the provisions of the Labor Code and in particular, Labor Code Sections 1770 to 1780, inclusive. In addition to said penalty and pursuant to said Section 1775, the difference between such stipulated prevailing wage rates and the amount paid to each worker for each calendar day or portion thereof for which each worker was paid less than the stipulated prevailing wage rate shall be paid to each worker by Contractor.

Pursuant to Section 1773 of the Labor Code, the general prevailing wage rates in the county, in which the work is to be done have been determined by the Director of the California Department of Industrial Relations and can be obtained on-line at their website at <http://www.dir.ca.gov>. It is mandatory for the Contractor and any subcontractor to pay not less than the specified rates to laborers and workers employed by them in the execution of this Contract.

The Contractor shall comply with the provisions enacted by AB 854 that require Contractor and any subcontractor be registered with the State Department of Industrial Relations (DIR) pursuant to Labor Code section 1725.5. This Contract is subject to monitoring and enforcement by the DIR pursuant to Labor Code Section 1771.4. The Contractor must post job site notices, pursuant to Title 8 California Code of Regulations Section 16451.

City will not recognize any claim for additional compensation because of the payment by Contractor of any wage rate in excess of the prevailing wage rate set forth in the Contract. The possibility of wage increases is one of the elements to be considered by Contractor in determining his bid, and will not under any circumstances be considered as the basis of a claim against City on the Contract.

Attention is directed to the requirements of Section 1773.8 of the Labor Code. Contractor shall make travel and subsistence payments to each worker needed to execute the work in accordance with the requirements of said Section 1773.8.

d. Payroll Records. Contractor's attention is directed to the following provisions of Labor Code Section 1776. Contractor shall be responsible for the compliance with these provisions by his subcontractors.

(1) Each contractor and subcontractor shall keep an accurate payroll record, showing the name, address, social security number, work classification, straight time and overtime hours worked each day and week, and the actual per diem wages paid to each journeyman, apprentice, worker, or other employee employed by him or her in connection with the public work.

The Contractor and all Subcontractors shall furnish the records specified in Labor Code Section 1776 directly to the Labor Commissioner, monthly in a format prescribed by the Labor Commissioner.

(2) The payroll records enumerated under subdivision (1) shall be certified and shall be available for inspection at all reasonable hours at the principal office of Contractor on the following basis:

(i) A certified copy of an employee's payroll record shall be made available for inspection or furnished to such employee or his or her authorized representative on request.

(ii) A certified copy of all payroll records enumerated in subdivision (1) shall be made available for inspection or furnished upon request to City, the Division of Labor Standards Enforcement and the Division of Apprenticeship Standards of the Department of Industrial Relations.

(iii) A certified copy of all payroll records enumerated in subdivision (1) shall be made available upon request to the public for inspection or copies thereof made; provided, however, that a request by the public shall be made through either City, the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement. If the requested payroll records have not been provided pursuant to paragraph (2), the requesting party shall, prior to being provided the records, reimburse the costs of preparation by Contractor, subcontractor and the entity through which the request was made. The public shall not be given access to such records at the principal office of Contractor.

(3) The certified payroll records shall be on forms provided by the Division of Labor Standards Enforcement or shall contain the same information as the forms provided by the Division.

(4) Each contractor shall file a certified copy of the records enumerated in subdivision (a) with the entity that requested such records within ten (10) days after receipt of a written request.

(5) Any copy of records made available for inspection as copies and furnished upon request to the public or City, the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement shall be marked or obliterated in such a manner as to prevent disclosure of an individual's name, address and social security number. The name and address of Contractor shall not be marked or obliterated.

(6) Contractor shall inform City of the location of records enumerated under subdivision (a), including the street address, city and county, and shall, within five working days, provide a notice of a change of location and address.

(7) In the event of noncompliance with the requirements of this Section, Contractor shall have ten (10) days in which to comply subsequent to receipt of written notice specifying in what respects such contractor must comply with this Section. Should noncompliance still be evident after such 10-day period, Contractor shall, as a penalty to the State or City, forfeit Twenty-five Dollars (\$25) for each calendar day, or portion thereof, for each worker, until strict compliance is effectuated. Upon the request of the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement, such penalties shall be withheld from progress payments then due.

The penalties specified in subdivision (g) of Labor Code Section 1776 for noncompliance with the provisions of said Section 1776 may be deducted from any monies due or which may become due to Contractor.

Contractor and each subcontractor shall preserve their payroll records for a period of three (3) years from the date of completion of the Contract.

e. Apprentices. Contractor shall fully comply with the requirements of Sections 1777.5 and 1777.6 of the California Labor Code and the regulations of the California Apprenticeship Council. In accordance with Section 1777.5, Contractor shall secure the necessary certificates and shall contribute to the apprenticeship fund or funds, as provided for therein. Contractor shall require each subcontractor who will perform work or labor or render service to Contractor in or about the construction of the work to comply fully with Sections 1777.5 and 1777.6 of the Labor Code. Information relative to apprenticeship standards, wage schedules and other requirements may be obtained from the State Division of Apprenticeship Standards and its branch offices.

f. Workers' Compensation. Pursuant to the requirements of Section 1860 of the California Labor Code, Contractor will be required to secure the payment of workers' compensation to his employees in accordance with the provisions of Section 3700 of the Labor code. By signing this Contract, Contractor certifies the following:

"I am aware of the provisions of Section 3700 of the California Labor Code which require every employer to be insured against liability for workers' compensation or to undertake self-insurance in accordance with the provisions of that code, and I will comply with such provisions before commencing the performance of the work of this contract."

g. Event of Default. Failure by Contractor to comply with any provision of this Section shall constitute a default of this Contract and shall be grounds for termination as provided in this Contract.

6. **Warranty**

Contractor warrants that all materials and work furnished (1) shall meet all requirements and conditions of City's Contract and manufacturer's warranty if any; (2) shall be free from defects in design, material; workmanship and methods of installation; and (3) shall be fit for the purposes intended. Work not conforming to these requirements, including substitutions not properly approved and authorized, may be considered defective and nonconforming. This warranty by the Contract is in addition to any warranties or guarantees required or provided by the manufacturer or supplier.

Contractor shall correct the work at its own expense promptly after written notice from City to do so and pay for any damage to other property resulting from such nonconforming work. If Contractor fails to do so promptly, or in an emergency when delay could cause risk of damage or loss, then City take whatever actions are necessary to have the nonconforming work removed, replaced or corrected at the expense of Contractor and to recover its damages, costs and expenses, including withholding the amount from any payment that is due or to commencing an action against any performance bond.

Nothing in this section shall be construed to establish a period of limitation with respect to other obligations that Contractor may have under these Contract Documents.

7. **Independent Contractor Status**

Contractor shall independently perform all work under this Contract and shall not be considered an agent or employee of City; nor shall Contractor's subcontractors or employees be considered as subagents of the Owner.

8. **Hazardous Chemicals and Wastes**

Should any release, discharge, leakage, spillage, emission or pollution of any hazardous chemicals or wastes occur due to Contractor's work, then Contractor at its sole cost, shall clean all affected property to the satisfaction of City and any governmental body with jurisdiction. Contractor shall immediately report any such release to the Director of Public Works.

If the performance of the work outlined by these Contract Documents creates any hazardous wastes, Contractor shall properly dispose of such wastes in full accordance with federal, state and local laws, at its expense. Contractor shall provide City with written proof of its or its subcontractor's registration as a hazardous waste transporter.

9. **Compliance with Laws**

All work performed by Contractor under this Contract shall be in accordance with applicable federal, state and local requirements, including, but not limited to environmental laws and laws regarding disposal of hazardous wastes.

10. **Noncollusion Declaration**

By executing this Contract, Contractor declares that only persons or parties interested in this Contract are those named in Contractor's Proposal and that such proposal was not made in the interest of or on behalf of any undisclosed person, firm or organization; that the proposal was genuine and not collusive or sham; that the signatory to this Contract has not directly or indirectly induced or solicited others to put in a sham proposal, or to refrain from proposing; and that the signatory to this Contract has not in a manner sought by collusion to secure for itself an advantage over other potential proposers.

11. **Conflicts of Interest**

Contractor covenants and declares that other than this Contract, it has no holdings or interests within the City of Emeryville nor business holdings or agreements with any official, employee or representative of City and shall disclose any such holdings or interests to City in writing.

12. **Discrimination Prohibited**

Contractor covenants and agrees that in performing the services required under this Contract, Contractor shall not discriminate against any person on the basis of race, color, religion, sex, sexual orientation, national origin, ancestry, age or disability.

13. **Payment Bond.**

A payment bond in an amount of 100% of the not to exceed amount of the Contract is required.

14. **Living Wage**

If this Agreement provides for compensation to Contractor of \$25,000 or more within a single fiscal year for providing services to the City, then Contractor shall comply with the requirements of the City's Living Wage Ordinance set forth in Chapter 31 of Title 5 of the Emeryville Municipal Code, unless (i) Contractor is a governmental entity, (ii) this Agreement is subject to a higher prevailing wage rate as defined in the California Labor Code, or (iii) this Agreement is subject to federal or state laws or regulations that would preclude the application of the City's laws.

Compliance with the Living Wage Ordinance, if applicable, shall be required during the term of the Agreement for all employees of Contractor who perform at least twenty-five percent (25%) of the work arising from this Agreement, unless said employees are otherwise exempt from the application of the Living Wage Ordinance pursuant to Section

5-31.08. Contractor shall promptly provide to the City documents and information verifying compliance with the requirements of the Living Wage Ordinance within ten (10) working days following a written request for such documentation and information from the City.

Failure to comply with the Living Wage Ordinance provides that a person claiming a violation thereof may bring an action against Contractor for back pay, reinstatement and compensatory damages, as well as a penalty up to three times the amount of damages for a willful violation, plus reasonable attorney's fees and costs. In addition, the City may terminate the Agreement and pursue any other remedies available to the City, including debarment, for violations of the Living Wage Ordinance.

Contractor shall notify each of its affected employees with regards to wages that are required to be paid pursuant to this Agreement. "Living Wage" means no less than \$15.26 per hour as of July 1, 2017, which includes the FY 2017 increase of 3% set annually on July 1st to reflect the twelve-month average increase to the Consumer Price Index for all urban consumers in the San Francisco-Oakland-San Jose Metropolitan Statistical Area for the preceding year from May to April, (not to exceed three percent (3%) in any one year) including wages and health benefits. If employer contributions for health benefits are not paid on an hourly basis, the employer must demonstrate to the City the hourly value of such benefits in order to receive credit for such payments to covered employees.

D. GENERAL PROVISIONS

1. Applicable Law

If any action at law or in equity is brought to enforce or interpret the provisions of this Contract, the rules, regulations, statutes and laws of the State of California will control. The exclusive venue for any legal action taken pursuant to this Contract shall be the State of California Superior Court for the County of Alameda or the United States District Court for the Northern District of California.

2. Assignment and Subcontracting

Neither this Contract nor any interest herein nor any claim hereunder may be assigned or subcontracted by Contractor either voluntarily or by operation of law, without the prior written consent of City. No such consent shall relieve Contractor of its obligations to comply fully with the requirements of this Contract.

3. Records

Contractor will permit City to audit, examine, and make copies of all contracts, invoices, materials, payrolls, records of personnel, conditions of employment and or data relating to all matters covered by this Contract. Except as otherwise authorized, such records shall be maintained for a period of three years from the date that final payment is made under this Contract.

4. **No Waiver**

Failure of City to insist upon strict performance of any of the terms and conditions hereof, or failure or delay to exercise any rights or remedies or to properly notify Contractor in the event of breach, or the acceptance of or payment for any good hereunder, shall not release Contractor of any of the warranties or obligations of this Contract and shall not be deemed a waiver of any right of City to insist upon strict performance hereof.

5. **Notices**

a. **Communications Relating to Daily Activities.** All communications relating to the day to day activities of the work shall be exchanged between the Operations Manager for the City and Larry Brunink for Contractor.

b. **Official Notices.** All other notices, writings or correspondence as required by this Contract shall be directed to City and Contractor, respectively, as follows:

CITY**City Manager****1333 Park Avenue****Emeryville, California 94608****Phone No. (510) 596-4330****Fax No. (510) 596-4389****CONTRACTOR**Kory Hopkins, Director of Landscape OperationsRubicon Landscape1952 Wright Ave, Richmond, CA 94804**Phone No.** 510.221.4400**Fax No.** 510.412-1751**E-Mail** koryh@rubiconprograms.org

Cell phone: 510.385.2867

6. No Personal Liability

No member, official or employee of City shall be personally liable to Contractor or any successor in interest in the event of any default or breach by City or for any amount which may become due to Contractor or successor on any obligation under this Contract.

7. Entire Agreement

This Contract contains the entire agreement of the parties with respect to the subject matter of this Contract. Any modifications to this Agreement shall be in writing.

8. Authority to Contract

Contractor covenants and declares that it has obtained all necessary approvals to bind Contractor to this Contract and that the representative signing the Contract is authorized to do so.

City and Contractor have executed this Contract on the date that it is executed by City of Emeryville.

CITY OF EMERYVILLECarolyn Lehr, City Manager

Date: _____

Approved as to form:


City Attorney**CONTRACTOR**By: Title: General ManagerDate: June 1, 2017