

# REQUEST FOR PROPOSALS

**FOR**

## **TRANSIENT OCCUPANCY TAX AUDITING SERVICES**

**RELEASE DATE:                      OCTOBER 15, 2018**  
**PROPOSAL DUE DATE:            NOVEMBER 7, 2018**

**ISSUED BY:                            CITY OF CARMEL-BY-THE-SEA**  
**ADMINISTRATION DEPARTMENT**  
**FINANCE DIVISION**

CITY OF CARMEL-BY-THE-SEA  
P.O. BOX CC  
CARMEL-BY-THE-SEA, CA 93921  
831.620.2000  
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**CONTENTS**

<b>TOPIC</b>	<b>PAGE NUMBER</b>
INTRODUCTION	3
SCOPE OF WORK	4
RFP SCHEDULE	5
PROPOSAL REQUIREMENTS	5
EVALUATION PROCEDURES	6
TERMS OF ENGAGEMENT	7
EXHIBITS	
a. Sample City Professional Services Agreement	8

## 1. INTRODUCTION

The City of Carmel-by-the-Sea is a general law city operating under the Council-Manager form of government. The City has a population of approximately 4,000, serves an area of one square mile and is located within Monterey County, approximately 120 miles south of San Francisco.

The City of Carmel-by-the-Sea is seeking proposals from qualified firms to conduct an audit of the books of hotels, motels and inns (“hostelries”) over the course of three years in the City of Carmel-by-the-Sea to ensure proper reporting of revenues to the City. The term is expected to be for three (3) years with two (2) one-year renewal option.

The audit shall be made in accordance with the City’s Transient Occupancy Tax Title 3- Revenue and Finance, Chapter 3.32 of the City’s Municipal Code. The selected firm will provide a final report of the audit results within 60 days of completion of fieldwork, including a recommendation for each property regarding the need for prior year audits. Prior years audits will be done on an as needed basis at the request of the City.

The City currently has 47 operating lodging establishments (“hostelries”). Transient occupancy tax (“TOT”) is one of the City’s top three revenue sources. TOT is budgeted at \$6,350,000 for Fiscal Year 2018-2019, which represents 28% of the City’s anticipated revenues.

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***The City must receive one (1) original and three (3) copies of the proposal by 4:00 PM PST on Wednesday, November 7, 2018 in a sealed envelope marked “Sealed Proposal- TOT Auditing Services”***

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For a firm to be considered, the City must receive one (1) original and three (3) copies of the proposal by 4:00 PST on Wednesday, November 7, 2018 at the address listed below:

US Post Office:	<b>or</b>	FedEx, UPS or other service:
City of Carmel-by-the-Sea		City of Carmel-by-the-Sea
Office of the City Clerk		Office of the City Clerk
P.O. Box CC		Eastside of Monte Verde between Ocean & 7th Avenues
Carmel-by-the-Sea, CA 93921		Carmel-by-the-Sea, CA 93921

All proposals must be in a sealed envelope and clearly marked “Sealed Proposal- TOT Auditing Services”. The original proposal should be unbound and the City encourages both the original and copies to be double-sided and with minimal packaging (i.e. no spiral binding, plastic covers, etc.).

The City of Carmel-by-the-Sea reserves the right to reject any and all proposals submitted. There is no express or implied obligation for the City of Carmel-by-the-Sea to reimburse firms for any expenses incurred in preparing proposals and responding to this RFP.

## 2. SCOPE OF WORK

The City wishes to engage external auditors to initially audit all 47 hostelries over a three-year period and subsequently on a rotating basis thereafter. According to existing City policy, hostelries will be selected for an audit on a rotating basis of every fifth hostelry on a numerical list, although the City is open to auditing a larger sample, contingent on its budget and the dollar cost of the bids received. The City will coordinate with the auditing firm to finalize the scheduling of said audits.

### **A. Services to be Performed:**

- i. Review the City's Municipal Code Chapter 3.32- Transient Occupancy Tax.
- ii. Verify the mathematical accuracy and timeliness of transient occupancy taxes filed with the City for fiscal years 2015-2016, 2016-2017 and 2017-2018.
- iii. Trace the gross revenue recorded on the transient occupancy tax returns prepared by the hostelry to gross revenue recorded in the hostelry's accounting records and to ascertain that they were in accordance with the City's ordinance.
- iv. Select a sample of rental transactions during the review period and for each transaction selected, verify tax computations and trace the amounts of rental revenues and transient occupancy taxes collected to the books and records of the hostelry.
- v. Review the internal control procedures of the hostelry to determine the following:
  - a) Methodology used to determine and account for "gross rents" and "uncollected rents" as reported to the City;
  - b) Methodology and procedures in place by the hostelry to identify transient and non-transient guests;
  - c) Methodology and documentation used to report exemptions, including complementary rooms, to the City.
- vi. Review the supporting documentation, on a sample basis, for exemptions claimed on the transient occupancy tax returns.
- vii. Perform additional procedures that the City considers necessary to verify the reasonableness of reported revenues of the hostelry.
- viii. Recommend best practices to help ensure better collections.

### **B. Reporting Deliverables:**

- i. The audit firm shall submit a draft report after each audit project (completion of the audit of five or more hostelries) to the City Budget and Contracts Director 40 days after the completion of the audit fieldwork.
- ii. Final report shall be submitted to the City Budget and Contracts Director within 20 days after the review of the draft report.

The City reserves the right to choose or approve the hostelries selected for the audit each year. The City's finance staff will provide assistance and cooperate with the auditing firm. The selected audit firm will be responsible for making working papers available to the City upon request. All working papers and reports are to be retained at the auditor's expense for a minimum of five years.

### 3. RFP SCHEDULE

The City's anticipated schedule regarding the selection of the auditing firm is outlined below. These dates are subject to change at the City's discretion.

Deliverable	Date
City issues RFP	Monday, October 15, 2018
RFP Questions Due	Wednesday, October 24, 2018 by 5 PM PST
RFP Answers Available	Friday, October 26, 2018 by 5 PM PST
Proposals Due	Wednesday, November 7, 2018 by 4 PM PST
Tentative Interviews as needed	Tuesday, November 13, 2018
Consideration by Council	Tuesday, December 4, 2018
Formal Notice to Proposers	Wednesday, December 5, 2018

All proposal-related questions must be submitted in writing to Robin Scattini, the City's Finance Manager, at [rscattini@ci.carmel.ca.us](mailto:rscattini@ci.carmel.ca.us) by close of day (5 PM PST) on Wednesday, October 24, 2018. The City will make every effort to post the response to these questions on the City's website by 5 PM PST on Friday, October 26, 2018. The City will issue an addendum to the RFP if necessary based upon the questions received.

### 4. PROPOSAL REQUIREMENTS

#### A. Technical Proposal

The technical proposal is intended to provide the City with an overview of the auditing firm's qualifications and approach to undertaking the transient occupancy tax audits. The purpose of the technical proposal is to demonstrate the auditing firm's qualifications, competence and capacity to perform the scope of work outlined within this RFP.

**No dollar units or total costs shall be included within the Technical Proposal Document.**

The technical proposal should be prepared simply and economically and provide a clear and concise description of the auditing firm's ability to meet the RFP requirements. The technical proposal document must include the following items:

- i. **Title Page:** Title page that shows the RFP subject, the firm's name, address, telephone number of the contact person and date of the proposal.
- ii. **Table of Content:** Table of contents that notes where the required RFP information can be found within the proposal.
- iii. **Transmittal Letter:** A signed transmittal letter briefly stating the proposer's understanding of the work to be performed, commitment to perform the work within the City's timeframe, a statement as to why the proposer believes itself to be qualified to perform this work and a statement that the proposal is a firm and irrevocable offer for thirty (30) days.

**iv. Detailed Proposal:**

- a. **License and Independence:** Statement regarding the proposer's license to practice in California and statement of independence.
- b. **Qualifications of the Firm and Experience:** The proposer shall state the size of the firm, the size of the firm's governmental audit staff and the location of the office from which this engagement will be performed and the number and nature of the professional staff to be employed on this engagement.
- c. **Staff Qualifications and Experience:** The proposer shall list the personnel assigned to the project, the functions each individual will perform and the anticipated hours of service for each individual. Include a resume for each designated individual that will be assigned to the project.
- d. **Approach:** Provide a detailed description of approach and methodology to be used to accomplish the scope of work outlined within this RFP. Provide a schedule that allows for the audit of all of the City's hostelrys over an initial three-year span and then over a subsequent two-year span.
- e. **References:** Provide at least three (3) references that received similar services from your firm including client name, project description, project start and end dates and client project manager's name, telephone number and email address.

***B. Sealed Dollar Cost Bid***

The sealed dollar cost bid should contain all pricing information relative to performing the audit engagement described within this RFP. The total all-inclusive maximum price to be bid is to contain all direct and indirect costs, including all out-of-pocket expenses. The sealed dollar cost bid shall include the following items:

- i. Name of Firm
- ii. Certification that the person signing the proposal is authorized to represent the firm, to submit the bid and to sign a contract with the City.
- iii. A total all-inclusive maximum price for the engagement, including details for pricing by fiscal year.
- iv. A total all-inclusive maximum price for the engagement, including details for pricing for subsequent years of engagement
- v. Rate for partners, specialists, supervisors and staff multiplied by anticipated hours for each individual/personnel.
- vi. Rates for additional professional services.
- vii. Payment terms.

**5. EVALUATION PROCEDURES AND CRITERIA**

Proposals will be reviewed by City Finance staff and evaluated based on the criteria listed below.

- A. **Mandatory elements:** Audit firm's independence; no conflict of interest with regard to any other work performed by the firm for the City of Carmel-by-the-Sea, firm's license/ability to practice in California; and adherence to the RFP requirements.
- B. **Technical Qualifications:** Experience and expertise of both the auditing firm and the personnel assigned to this engagement.

- C. **Audit Approach:** Adequacy of proposed staffing; proposed sampling techniques and analytical procedures; appropriateness and reasonableness of schedule of audits; and responsiveness and understanding of City needs.
- D. **Price:** While an important component, price will be considered along with the other criteria and will not be the sole determination for selecting a firm.
- E. **Possible Oral Presentation:** The City may, at its discretion, request any, or all, of the firms to make an oral presentation, most likely by telephone or web

## **6. TERMS OF ENGAGEMENT**

The City anticipates entering into a five-year agreement with the selected auditing firm: three (3) years initially with the option to renew for two (2) subsequent years, subject to annual review and recommendation by the City Administrator, satisfactory performance by the auditing firm, satisfactory negotiation of terms and annual availability of an appropriation.

## **7. RIGHTS OF THE CITY**

This RFP does not commit the City to enter into a contract, nor does it obligate the City to pay for any costs incurred in preparation and submission of proposals or in anticipation of a contract. The City reserves the right to: Make the selection based on its sole discretion; Reject any and all proposals; Issue subsequent Requests for Proposals; Postpone opening for its own convenience; Remedy technical errors in the Request for Proposals process; Negotiate with any, all, or none of the Proposers; Accept other than the lowest offer; Waive informalities and irregularities in the Proposals and/or Enter into an agreement with another Proposer in the event the originally selected Proposer defaults or fails to execute an agreement with the City.

Materials submitted by respondents are subject to public inspection under the California Public Records Act (Government Code Sec. 6250 et seq.), unless exempt. An agreement shall not be binding or valid with the City unless and until it is executed by authorized representatives of the City and of the Proposer. The selected firm will be required to meet all City contracting requirements, including entering into a professional services agreement (a sample agreement is attached as Exhibit A of this RFP).

**Exhibit A**  
**Sample**  
**City of Carmel-by-the-Sea**  
**Professional Services Agreement**

**THIS AGREEMENT** is executed this \_\_\_\_ day of \_\_\_\_\_, 2018, by and between the City of Carmel-By-The-Sea, a municipal corporation, (hereinafter "City"), and [Name of Consultant], (hereinafter "Consultant"), collectively referred to herein as the "parties".

**WHEREAS**, the City wishes to engage Consultant to perform the services required by this Agreement; and,

**WHEREAS**, Consultant is willing to render such professional services, as hereinafter defined, on the following terms and conditions; and

**WHEREAS**, Consultant represents that it is trained, experienced and competent and holds all necessary licenses and certifications to perform the services required by this Agreement.

**NOW, THEREFORE**, in consideration of the terms and conditions herein contained, the parties hereby covenant and agree as follows:

**1. SERVICES**

- A. **Scope of Services**. Consultant agrees to provide to the City, as the scope of services ("Scope of Services") under this Agreement, the following: [insert general description of the scope of work]. The Scope of Services is attached hereto as Exhibit "A."
- B. **Change Orders**. Agreements and Change Orders exceeding \$24,999 require City Council approval to be valid. The City may, from time to time, by written notice to Consultant, make changes to the Scope of Services as defined in Section 1.A above, and Consultant shall carry out the Services subject to such changes, within the time limits agreed to by the parties. The compensation and/or Project Schedule shall be increased or decreased by written Change Order to this Agreement ("Change Order"), signed by the City and Consultant, prior to commencement of any such changes of the Services. However, any increase in compensation beyond the compensation limit amount approved by the City Council must be authorized in advance by Council. The City shall not be liable to pay additional compensation to Consultant for any additional services performed without an executed Change Order issued prior to proceeding with amended services. All other terms of this Agreement shall apply to authorized Change Orders.

**2. COMPENSATION**

- A. **Total Fee**. The City agrees to pay and Consultant agrees to accept as full and fair consideration for the performance of this Agreement, hourly fees as set forth in Consultant's Fee Schedule (Exhibit "B"), in a total amount not-to-exceed \_\_\_\_\_ Thousand \_\_\_\_ Hundred and \_\_\_\_ Dollars (\$\_\_\_\_\_.00). Such compensation shall be considered the "Maximum Authorized Expenditure" under this Agreement. Payment of any compensation to Consultant hereunder shall be contingent upon performance of the



terms and conditions of this Agreement to the satisfaction of the City. If the City determines that the Services set forth in the written invoice have not performed in accordance with the terms of this Agreement, the City shall not be responsible for payment until the Services have been satisfactorily performed.

B. **Invoicing.** Consultant shall submit to the City monthly written invoices to the City's Project Representative, identified in Section 5 herein. Invoices shall be prepared in a form satisfactory to the City, describing the services rendered and associated costs for the period covered by the invoice. The City shall provide invoicing format upon request. Consultant shall not bill the City for duplicate services performed by more than one person. Consultant's invoices shall include, but are not limited to, the following information:

- i. Invoice number and date;
- ii. A brief description of services performed for each project phase and/or task;
- iii. The total amount due for the period covered by this invoice, including subconsultants and vendors of services or goods;

The City shall make payment on each such invoice within thirty (30) days of receipt; provided, however, that if Consultant submits an invoice which is incorrect, incomplete, or not in accord with the provisions of this Agreement, the City shall not be obligated to process any payment to Consultant until thirty (30) days after a correct and complying invoice has been submitted by Consultant.

Consultant agrees to remit and shall be responsible for all withholding taxes, income taxes, unemployment insurance deductions, and any other deductions required by applicable federal, state or local laws and regulations for Consultant, its employees, subconsultants and vendors of services or goods.

C. **Adjustment of Fees.** The City may increase or decrease the Maximum Authorized Expenditure by issuing a Change Order to the Agreement in accordance with Section 1.B "Change Orders" above. Should Consultant consider that any request or instruction from the City's Project Representative constitutes a change in the scope of services, Consultant shall so advise the City's Project Representative, in writing, within fourteen (14) calendar days of such request or instruction. Without said written advice within the time period specified, the City shall not be obligated to make any payment of additional compensation to Consultant.

D. **Hourly Rates.** Payment for all authorized services, including payment for authorized on-call, as-needed services, shall be made by the City to Consultant in accordance with the various hourly rates as set forth in the Consultant's Fee Schedule (Exhibit "B").

E. **Subconsultants and Vendors.** Invoices for subconsultants and vendors of services or goods will be paid by the City to Consultant in accordance with the various rates as set forth in the Consultant's Fee Schedule (Exhibit "B"). All reimbursable expenses shall be considered as included within the Maximum Authorized Expenditure. Consultant shall be solely responsible for payment to subconsultants and vendors of services or goods, and the City shall not be responsible or liable for any payments to subconsultants and vendors, either directly or indirectly.

F. **Audit and Examination of Accounts:**

- i. Consultant shall keep and will cause any assignee or subconsultant under this Agreement to keep accurate books of records and accounts, in accordance with sound accounting principles, which pertain to services to be performed under this Agreement.
- ii. Any audit conducted of books of records and accounts shall be in accordance with generally accepted professional standards and guidelines for auditing.
- iii. Consultant hereby agrees to disclose and make available any and all information, reports, books of records or accounts pertaining to this Agreement to the City and any city of the County of Monterey, or other federal, state, regional or governmental agency which provides funding for these Services.
- iv. Consultant shall include the requirements of Section 2F, "Audit and Examination of Accounts", in all contracts with assignees or subconsultants under this Agreement.
- v. All records provided for in this Section are to be maintained and made available throughout the performance of this Agreement and for a period of not less than four (4) years after full completion of services hereunder. All records, which pertain to actual disputes, litigation, appeals or claims, shall be maintained and made available for a period of not less than four (4) years after final resolution of such disputes, litigation, appeals or claims.

3. **AGREEMENT TERM**

- A. **Term.** The work under this Agreement shall commence by [start date of contract] and shall be completed by [end date of contract] unless sooner terminated or the City grants an extension of time in writing pursuant to the terms of this Agreement, except for provisions in this Agreement that shall survive the termination or completion of this Agreement. Consultant shall perform Change Order services as set out in Section 1.B, "Amendment of Services (Change Orders)", in a timely manner or in accordance with the agreed upon Change Order Project Schedule.
- B. **Timely Work.** Consultant shall perform all Services in a timely fashion, as set forth more specifically in Section 3.A, "Term", and Section 3.C, "Project Schedule", of this Agreement. Failure to perform is hereby deemed a material breach of this Agreement, and the City may terminate this Agreement with no further liability hereunder, or may authorize, in writing, an extension of time to the Agreement.
- C. **Project Schedule.** Services shall be completed by Consultant in accordance with the Project Schedule attached hereto as Exhibit "C". The parties may, from time to time, by Change Order, alter the Project Schedule. Consultant shall provide the Services pursuant to the Project Schedule or any applicable Project Schedule Change Order. If at any time Consultant discovers that the Project Schedule cannot be met, Consultant shall promptly notify the City in writing and provide a revised Project Schedule for review and consideration by City.
- D. **Notice to Proceed.** Upon execution of this Agreement by both parties and the receipt of all documentation required by this Agreement to be provided by Consultant to the City,

the City shall issue a written Notice to Proceed to the Consultant. The City may, in its sole discretion, issue subsequent notices from time to time regarding further portions or phases of the work. Upon receipt of such notices, Consultant shall diligently proceed with the Services authorized and complete those Services within the agreed time specified in said notice. Consultant shall not proceed with any of the Services unless they have received a Notice to Proceed from the City.

#### 4. CONSULTANT'S EMPLOYEES AND SUBCONSULTANTS

- A. **Listed Employees and Subconsultants.** Consultant shall perform the Services using the individuals listed in the Key Employees and Subconsultants List attached hereto in Exhibit "A".
- B. **Substitution of Employees or Subconsultants:**
- i. Consultant shall not substitute any key employee or subconsultant listed in Exhibit "A" without the prior written approval of the City, and such approval shall not be unreasonably withheld. The City shall not approve removal or substitution of employees or subconsultants for the reason that Consultant or its affiliates has called on such individuals to perform services for another client of the Consultant.
  - ii. If, at any time, the City reasonably objects to the performance, experience, qualifications or suitability of any of Consultant's employees or subconsultants, then Consultant shall, on written request from the City, replace such employee or subconsultant. Consultant shall, subject to scheduling and staffing considerations, make reasonable efforts to replace the individual with an individual of similar competency and experience.
  - iii. Regardless of whether or not the City consents to, or requests a substitution of any employee or subconsultant of Consultant, the City shall not be liable to pay additional compensation to Consultant for any replacement or substitution.
- C. **Sub-agreements with Subconsultants.** Consultant shall incorporate the terms and conditions of this Agreement into all sub-agreements with subconsultants in respect of the Services necessary to preserve all rights of the City under this Agreement. Consultant shall be fully responsible to the City of all acts and omissions of subconsultants and of persons employed by any subconsultant.
- D. **Not an Agent of the City.** Nothing in this Agreement shall be interpreted so as to render the City the agent, employer, or partner of Consultant, or the employer of anyone working for or subcontracted by Consultant, and Consultant must not do anything that would result in anyone working for or subcontracted by Consultant being considered an employee of the City. Consultant is not, and must not claim to be, an agent of the City.
- E. **Independent Contractor:**
- i. Consultant is an independent contractor. This Agreement does not create the relationship of employer and employee, a partnership, or a joint venture. The City shall not control or direct the details, means, methods or processes by which Consultant performs the Services. Consultant is responsible for performance of the Services and may not delegate or assign any Services to any other person except

as provided for herein. Consultant shall be solely liable for the work quality and conditions of any partners, employees and subconsultants.

- ii. No offer or obligation of permanent employment with the City or particular City department or agency is intended in any manner, and Consultant shall not become entitled by virtue of this Agreement to receive from the City any form of employee benefits including but not limited to sick leave, vacation, retirement benefits, workers' compensation coverage, insurance or disability benefits. Consultant shall be solely liable for and obligated to pay directly all applicable taxes, including federal and state income taxes and social security, arising out of Consultant's performance of Services under this Agreement. In connection therewith, Consultant shall defend, indemnify and hold the City harmless from any and all liability, which the City may incur because of Consultant's failure to pay such taxes.

## 5. REPRESENTATIVES AND COMMUNICATIONS

- A. **City's Project Representative.** The City appoints the individual named below as the City's Project Representative for the purposes of this Agreement ("City's Project Representative"). The City may unilaterally change its project representative upon notice to Consultant.

Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Address: \_\_\_\_\_  
Telephone: \_\_\_\_\_  
Email: \_\_\_\_\_

- B. **Consultant's Project Manager.** Consultant appoints the person named below as its Project Manager for the purposes of this Agreement ("Consultant's Project Manager").

Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Address: \_\_\_\_\_  
Telephone: \_\_\_\_\_  
Email: \_\_\_\_\_

- C. **Meet and Confer.** Consultant agrees to meet and confer with the City's Project Representative, its agents or employees with regard to Services as set forth herein as may be required by the City to insure timely and adequate performance of this Agreement.
- D. **Communications and Notices.** All communications between the City and Consultant regarding this Agreement, including performance of Services, shall be between the City's Project Representative and Consultant's Project Manager. Any notice, report, or other document that either party may be required or may wish to give to the other must be in writing and shall be deemed to be validly given to and received by the addressee, if

delivered personally, on the date of such personal delivery, if delivered by email, on the date of transmission, or if by mail, seven (7) calendar days after posting.

## 6. INDEMNIFICATION

Consultant hereby agrees to the following indemnification clause:

To the fullest extent permitted by law (including, without limitation, California Civil Code Sections 2782 and 2782.6), Consultant shall defend (with legal counsel reasonably acceptable to the City), indemnify and hold harmless the City and its officers, designated agents, departments, officials, representatives and employees (collectively "Indemnitees") from and against claims, loss, cost, damage, injury expense and liability (including incidental and consequential damages, Court costs, reasonable attorneys' fees as may be determined by the Court, litigation expenses and fees of expert consultants or expert witnesses incurred in connection therewith and costs of investigation) to the extent they arise out of, pertain to, or relate to, the negligence, recklessness, or willful misconduct of Consultant, any subconsultant or subcontractor, anyone directly or indirectly employed by them, or anyone that they control (collectively "Liabilities"). Such obligations to defend, hold harmless and indemnify any Indemnitee shall not apply to the extent that such Liabilities are caused in part by the active negligence or willful misconduct of such Indemnitee.

Notwithstanding the provisions of the above paragraph, Consultant agrees to indemnify and hold harmless the City from and against all claims, demands, defense costs, liability, expense, or damages arising out of or in connection with damage to or loss of any property belonging to Consultant or Consultant's employees, subconsultants, representatives, patrons, guests or invitees.

Consultant further agrees to indemnify the City for damage to or loss of City property to the proportionate extent they arise out of Consultant's negligent performance of the work associated with this Agreement or to the proportionate extent they arise out of any negligent act or omission of Consultant or any of Consultant's employees, agents, subconsultants, representatives, patrons, guests or invitees; excepting such damage or loss arising out of the negligence of the City.

## 7. INSURANCE

Consultant shall submit and maintain in full force all insurance as described herein. Without altering or limiting Consultant's duty to indemnify, Consultant shall maintain in effect throughout the term of this Agreement a policy or policies of insurance with the following minimum limits of liability:

- A. Commercial General Liability Insurance including but not limited to premises, personal injuries, bodily injuries, property damage, products, and completed operations, with a combined single limit of not less than \$1,000,000 per occurrence and \$2,000,000 in the aggregate.
- B. Professional Liability Insurance with limits of not less than \$1,000,000 per occurrence or claim and \$2,000,000 in the aggregate. Consultant will either maintain or cause to be maintained professional liability coverage in full force or obtain extended reporting (tail) coverage (with the same liability limits) for at least three years following the City's acceptance of the work.

- C. Automobile Liability Insurance covering all automobiles, including owned, leased, non-owned, and hired automobiles, used in providing Services under this Agreement, with a combined single limit of not less than \$1,000,000 per occurrence.
- D. Workers' Compensation Insurance. If Consultant employs others in the performance of this Agreement, Consultant shall maintain Workers' Compensation insurance in accordance with California Labor Code section 3700 and with a minimum of \$1,000,000 per occurrence.
- E. Other Insurance Requirements:
- i. All insurance required under this Agreement must be written by an insurance company either:
    - a. admitted to do business in California with a current A.M. Best rating of no less than A:VI; or
    - b. an insurance company with a current A.M. Best rating of no less than A:VII. Exception may be made for the State Compensation Insurance Fund when not specifically rated.
  - ii. Each insurance policy required by this Agreement shall not be canceled, except with prior written notice to the City.
  - iii. The general liability and auto policies shall:
    - a. Provide an endorsement naming the City of Carmel-by-the-Sea, its officers, officials, employees, and volunteers as additional insureds. General liability coverage can be provided in the form of an endorsement to the Consultant's insurance (at least as broad as ISO Form CG 20 10 11 85 or both CG 20 10 and CG 23 37 forms if later revisions used).
    - b. Provide that such Consultant's insurance is primary as respects the City, its officers, officials, employees, and volunteers. Any insurance or self-insurance maintained by the City of Carmel-by-the-Sea shall be excess to the Consultant's insurance and shall not contribute with it.
    - c. Contain a "Separation of Insureds" provision substantially equivalent to that used in the ISO form CG 00 01 10 01 or their equivalent.
    - d. Provide for a waiver of any subrogation rights against the City via an ISO CG 24 01 10 93 or its equivalent.
  - iv. Prior to the start of work under this Agreement, Consultant shall file certificates of insurance and endorsements evidencing the coverage required by this Agreement with the City. Consultant shall file a new or amended certificate of insurance promptly after any change is made in any insurance policy which would alter the information on the certificate then on file.
  - v. Neither the insurance requirements hereunder, nor acceptance or approval of Consultant's insurance, nor whether any claims are covered under any insurance, shall in any way modify or change Consultant's obligations under the indemnification clause in this Agreement, which shall continue in full force and effect. All coverage available to the Consultant as named insured shall also be available and applicable to the additional insured. Notwithstanding the insurance requirements contained

herein, Consultant is financially liable for its indemnity obligations under this Agreement.

- vi. All policies shall be written on a first dollar coverage basis or contain a deductible provision. Any deductibles or self-insured retentions (“SIR”) must be declared to and approved by the City. At the option of the City, either: the insured shall reduce or eliminate such deductibles or SIR as respects the City, its officers, officials, employees and volunteers; or Consultant shall provide a financial guarantee satisfactory to the City guaranteeing payment of losses and related investigations, claim administration, and defense expenses. In no event shall any SIR or insurance policy contain language, whether added by endorsement or contained in the policy conditions, that prohibits satisfaction of any self-insured provision or requirement by anyone other than the named insured, or by any means including other insurance, or which is intended to defeat the intent or protection of an additional insured.
- vii. City reserves the right to modify these requirements, including limits, based on the nature of the risk, prior experience, insurer, coverage, or other special circumstances.
- viii. Consultant shall require and verify that all subconsultants and subcontractors maintain insurance meeting all the requirements stated herein.

## **8. PERFORMANCE STANDARDS**

- A. Consultant warrants that Consultant and Consultant’s agents, employees, and subconsultants performing Services under this Agreement are specially trained, experienced, and competent and have the degree of specialized expertise contemplated within California Government Code Section 37103, and further, are appropriately licensed to perform the work and deliver the Services required under this Agreement.
- B. Consultant, its agents, employees, and subconsultants shall perform all Services in a safe and skillful manner consistent with the highest standards of care, diligence and skill ordinarily exercised by professional consultants in similar fields in accordance with sound professional practices. All work product of Consultant shall comply with all applicable laws, rules, regulations, ordinances and codes. Consultant also warrants that it is familiar with all laws that may affect its performance of this Agreement and shall advise City of any changes in any laws that may affect Consultant’s performance of this Agreement. All Services performed under this Agreement that are required by law to be performed or supervised by licensed personnel shall be performed in accordance with such licensing requirements.
- C. Consultant shall furnish, at its own expense, all materials, equipment and personnel necessary to carry out the terms of this Agreement. Consultant shall not use the City premises, property (including equipment, instruments, or supplies) or personnel for any purpose other than in the performance of its obligations under this Agreement.
- D. Consultant agrees to perform all work under this Agreement to the satisfaction of City and as specified herein. The City’s Project Representative or his or her designee shall perform evaluation of the work. If the quality of work is not satisfactory, City in its discretion may meet with Consultant to review the quality of work and resolve the matters of concern, and may require Consultant to repeat the work at no additional fee until it is satisfactory.

## 9. CITY INFORMATION AND RESOURCES

- A. **Available Information.** The City shall make available to Consultant all relevant information, plans, maps, reports, specifications, standards and pertinent data which is in the hands of the City and is required by Consultant to perform the Services. Consultant shall be entitled to rely upon the accuracy and completeness of such information and data furnished by the City, except where it is stated otherwise or unreasonable.
- B. **City Resources.** The City acknowledges that Consultant's ability to provide the Services in accordance with this Agreement may be dependent on the City providing available information and resources in a prompt and timely manner as reasonably required by Consultant. To the extent that the City fails to provide City resources, Consultant shall not be liable for any resulting delay in the Services or failure to meet the Project Schedule, but in no event shall such delay or failure to provide City resources constitute a breach of this Agreement by the City, nor shall Consultant be entitled to extra compensation for same.
- C. **Obligations of Consultant.** No reviews, approvals, or inspections carried out or supplied by the City shall derogate from the duties and obligations of Consultant, and all responsibility related to performance of the Services shall be and remain with Consultant.

## 10. OWNERSHIP AND USE OF MATERIALS

- A. **Ownership of the Materials.** All data, studies, reports, calculations, field notes, sketches, designs, drawings, plans, specifications, cost estimates, manuals, correspondence, agendas, minutes, notes, audio-visual materials, photographs, models, software data, computer software (if purchased on the City's behalf) and other documents or products produced by Consultant under this Agreement (collectively, "the Materials") are and shall remain the property of the City even though Consultant or another party may have physical possession of them or a portion thereof. Consultant hereby waives, in favor of the City, any moral rights Consultant, its employees, subconsultants, vendors, successors or assignees may have in the Materials.
- B. **No Patent or Copyright Infringement.** Consultant guarantees that in its creation of the Materials produced under this Agreement, no federal or state patent or copyright laws were violated. Consultant agrees that all copyrights, which arise from creation of the work or Services pursuant to this Agreement, shall be vested in the City and waives and relinquishes all claims to copyright or intellectual property rights in favor of the City. Consultant covenants that it will defend, indemnify and hold City harmless from any claim or legal action brought against the City for alleged infringement of any patent or copyright related to City's use of Materials produced by Consultant and its employees, agents and subconsultants under this Agreement.
- C. **Delivery and Use of the Materials.** All Materials shall be transferred and delivered by Consultant to the City without further compensation following the expiration or sooner termination of this Agreement, provided that the City may, at any time prior to the expiration or earlier termination of this Agreement, give written notice to Consultant requesting delivery by Consultant to the City of all or any part of the Materials in which event Consultant shall forthwith comply with such request. The Materials created electronically must be submitted in a format and medium acceptable to the City. The



Materials may be used by the City in any manner for the intended purpose or as part of its operations associated with the Materials.

- D. **Survival of Ownership and Use Provisions.** It is understood and agreed that the provisions contained in Section 10, Ownership and Use of Materials, shall survive the expiration or earlier termination of this Agreement, and that this Section is severable for such purpose.
- E. **Additional Copies.** If the City requires additional copies of reports, or any other material that Consultant is required to furnish as part of the Services under this Agreement, Consultant shall provide such additional copies, and the City shall compensate Consultant for the actual costs related to the production of such copies by Consultant.

## 11. CONFIDENTIALITY

- A. **No Disclosure.** Consultant shall keep confidential and shall not disclose, publish or release any information, data, or confidential information of the City to any person other than representatives of the City duly designated for that purpose in writing by the City. Consultant shall not use for Consultant's own purposes, or for any purpose other than those of the City, any information, data, or confidential information Consultant may acquire as a result of the performance of the Services under this Agreement. Consultant shall promptly transmit to the City any and all requests for disclosure of any such confidential information or records. The obligations under this Section shall survive the expiration or earlier termination of this Agreement.
- B. **California Public Records Act.** Consultant acknowledges that the City is subject to the California Public Records Act (Government Code Section 6250 et seq.), known as the "PRA", and agrees to any disclosure of information by the City as required by law. Consultant further acknowledges that it may have access to personal information as defined under the PRA, and Consultant shall not use any such personal information for any purposes other than for the performance of Services under this Agreement without the advance written approval of the City.

All Scopes of Services and related documents received shall be public records, with the exception of those elements, identified by the Consultant as business trade secrets and are plainly marked "Trade Secret", "Confidential" or "Proprietary". If disclosure is required under the PRA or otherwise by law, the City shall not be liable or responsible for the disclosure of any such records and the Consultant shall indemnify, defend, and hold the City harmless for any such disclosure.

## 12. CONFLICT OF INTEREST

Consultant is required to file a Form 700 in compliance with the City's Conflict of Interest Code unless a written determination by the City Administrator is made modifying or eliminating said requirement, or unless otherwise exempted by law.

In addition, Consultant, Consultant's employees, and subconsultants agree as follows:

- A. That they shall conduct their duties related to this Agreement with impartiality, and shall, if they exercise discretionary authority over others in the course of those duties, disqualify

themselves from dealing with anyone with whom a relationship between them could bring the impartiality of Consultant or its employees into question;

- B. Shall not influence, seek to influence, or otherwise take part in a decision of the City knowing that the decision may further their private interests;
- C. Shall not accept any commission, discount, allowance, payment, gift, or other benefit connected, directly or indirectly, with the performance of Services related to this Agreement, that causes, or would appear to cause, a conflict of interest;
- D. Shall have no financial interest in the business of a third party that causes, or would appear to cause, a conflict of interest in connection with the performance of the Services related to this Agreement, and if such financial interest is acquired during the term of this Agreement, Consultant shall promptly declare it to the City, and;
- E. Shall not, during the term of this Agreement, perform a service for, or provide advice to, any person, firm, or corporation, which gives rise to a conflict of interest between the obligations of Consultant under this Agreement and the obligations of Consultant to such other person, firm or corporation.

### 13. DISPUTE RESOLUTION

- A. **Dispute Resolution Procedures.** The parties shall make reasonable efforts to promptly resolve any dispute, claim, or controversy arising out of or related to this Agreement (“Dispute”) using the Dispute Resolution Procedures set forth in this Section.
- B. **Negotiations.** First, the City’s Project Representative and Consultant’s Project Manager shall make reasonable efforts to resolve any Dispute by amicable negotiations and shall provide frank, candid, and timely disclosure of all relevant facts, information, and documents to facilitate negotiations. Should these negotiations be unsuccessful in resolving the Dispute, the matter shall be promptly referred to the City Administrator or designee, and the Consultant’s Principal, who shall meet and confer, in good faith, to resolve the Dispute to mutual satisfaction of the parties.
- C. **Mediation.** If all or any portion of a Dispute cannot be resolved by good faith negotiations as set forth above within thirty (30) days of the date that the matter was referred to the City Administrator pursuant to subsection B above, either party may, by notice to the other party, submit the Dispute for formal mediation to a mediator selected mutually by the parties from the Monterey Superior Court’s Court-Directed Mediator Panel list. The duration of any such mediation shall not exceed 2 hours unless otherwise agreed to by the parties. The cost of the mediation (including fees of mediators) shall be borne equally by the parties, and each party shall bear its own costs of participating in mediation. The mediation shall take place within or in close proximity to the City of Carmel-by-the-Sea.

In any mediation conducted pursuant to this section, the provisions of California Evidence Code section 1152 shall be applicable to limit the admissibility of evidence disclosed by the parties in the course of the mediation. In the event the parties are unsuccessful in resolving the dispute through the mediation process, then the parties agree that the dispute shall be submitted to Binding Arbitration to a single Arbitrator in accordance with the existing Rules of Practice and Procedure of the Judicial Arbitration

and Mediation Services, Inc. (JAMS) within thirty (30) days of the close of mediation as declared by the mediator.

- D. **Arbitration.** The submission to Mediation and Arbitration in accordance with the requirements of this section of any and all agreements, differences, or controversies that may arise hereunder is made a condition precedent to the institution of any action or appeal at law or in equity with respect to the controversy involved. The award by the arbitrator shall have the same force and effect and may be filed and entered, as a judgment of the Superior Court of the State of California and shall be subject to appellate review upon the same terms and conditions as the law permits for judgments of Superior Courts. A "Prevailing Party" shall be determined in the Arbitration, and the prevailing party shall be entitled to reasonable attorney's fees and costs incurred, and accrued interest on any unpaid balance that may be due. Costs shall include the cost of any expert employed in the preparation or presentation of any evidence. All costs incurred and reasonable attorney fees shall be considered costs recoverable in that proceeding, and be included in any award.

#### 14. TERMINATION OF AGREEMENT

- A. **Termination for Cause or Default.** The City reserves the right to immediately terminate this Agreement, in whole or in part, if Consultant or any subconsultant defaults or fails to deliver the Services in accordance with the terms and conditions of this Agreement. Such termination shall be in writing, shall set forth the effective date of termination, shall not result in any penalty or other charges to the City, and may be issued without any prior notice. Without limitation, Consultant is in default of its obligations contained in this Agreement if Consultant, or any subconsultant:
- i. Fails to perform the required Services within the term and/or in the manner provided under this Agreement;
  - ii. Fails to supply sufficient, properly skilled workers or proper workmanship, products, material, tools and equipment to perform the Services;
  - iii. Fails to observe or comply with all laws, ordinances, including all requirements of governmental or quasi-governmental authorities, including federal, state, and local government enactments, bylaws, and other regulations now or, following the date of this Agreement, in force that pertain to;
  - iv. Fails to observe or comply with the City's reasonable instructions;
  - v. Breaches the Conflict of Interest provisions of this Agreement; or
  - vi. Otherwise violates any provision of this Agreement.
- B. **Termination for Convenience.** The City may, at its option, terminate this Agreement, in whole or in part, at any time during the Agreement Term for the convenience of the City.
- C. **Steps after Termination:**
- i. Upon termination of this Agreement by the City for any reason, the City shall pay Consultant for satisfactorily performed Services and disbursements incurred by Consultant to the date of termination pursuant to this Agreement, less any amounts

necessary to compensate the City for damages or costs incurred by the City arising from Consultant's default. Termination will be without prejudice to any other rights or remedies the City may have.

- ii. Upon receipt of written notice of termination of this Agreement by the City for any reason, Consultant shall:
  - a. Promptly cease all Services, including Services provided by any subconsultant, unless otherwise directed by the City; and
  - b. Deliver to the City all the Materials provided to Consultant or prepared by or for Consultant or the City in connection with this Agreement. Such Materials are to be delivered to the City in completed form; however, notwithstanding the provisions of Section 10, Ownership and Use of Materials, herein, the City may condition payment for services rendered to the date of termination upon Consultant's delivery to the City of such Materials.
- iii. In the event this Agreement is terminated by the City for any reason, the City is hereby expressly permitted to assume the projects and Services, and to complete them by any means including, but not limited to, an agreement with another party.

## 15. LEGAL ACTION / VENUE

- A. Should either party to this Agreement bring legal action against the other, the validity, interpretation and performance of this Agreement shall be controlled by and construed under the laws of the State of California, excluding California's choice of law rules.
- B. Venue for any such action relating to this Agreement shall be in Monterey County.
- C. If any legal action or proceeding, including action for declaratory relief, is brought for the enforcement of this Agreement or because of an alleged dispute, breach, default or misrepresentation in connection with this Agreement, the prevailing party shall be entitled to recover reasonable attorneys' fees as may be determined by the Arbitrator, experts' fees, and other costs, in addition to any other relief to which the party may be entitled.

## 16. MISCELLANEOUS PROVISIONS

- A. **Non-discrimination**. During the performance of this Agreement, Consultant, its officers, employees, agents and subconsultants, shall not unlawfully discriminate against any person because of race, religion, creed, color, gender, national origin, ancestry, physical disability, mental disability, medical condition, marital status, age, or sexual orientation, either in Consultant's employment practices or in the furnishing of services to recipients. Consultant further acknowledges that harassment in the workplace is not permitted in any form, and will take all necessary actions to prevent such conduct.
- B. **Acceptance of Services Not a Release**. Acceptance by the City of the Services to be performed under this Agreement does not operate as a release of Consultant from professional responsibility for the Services performed.
- C. **Force Majeure**. Either party shall be absolved from its obligation under this Agreement when and to the extent that performance is delayed or prevented, and in the City's case,

when and to the extent that its need for vehicles, materials, or Services to be supplied hereunder are reduced or eliminated by any course, except financial, for reasons beyond its control. Such reasons include, but are not limited to: earthquake, flood, epidemic, fire, explosion, war, civil disorder, act of God or of the public enemy, act of federal, state or local government, or delay in transportation to the extent that they are not caused by the party's willful or negligent acts or omissions, and to the extent that they are beyond the party's reasonable control.

- D. **Headings**. The headings appearing herein shall not be deemed to govern, limit, modify, or in any manner affect the scope, meaning or intent of the provisions of this Agreement. The headings are for convenience only.
- E. **Entire Agreement**. This Agreement, including the Exhibits attached hereto, constitutes the entire agreement between the parties hereto with respect to the terms, conditions, and Services and supersedes any and all prior proposals, understandings, communications, representations and agreements, whether oral or written, relating to the subject matter thereof pursuant to Section 1B, "Change Order of Services". Any Change Order to this Agreement will be effective only if it is in writing signed by both parties hereto and shall prevail over any other provision of this Agreement in the event of inconsistency between them.
- F. **Conflict between Agreement and Exhibits**. In the event of a conflict between a provision in this Agreement and a provision in an Exhibit attached to this Agreement, the provisions in this Agreement shall take precedence.
- G. **Counterparts**. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, and may be signed in counterparts, but all of which together shall constitute one and the same Agreement.
- H. **Multiple Copies of Agreement**. Multiple copies of this Agreement may be executed, but the parties agree that the Agreement on file in the office of the City's City Clerk is the version of the Agreement that shall take precedence should any difference exist among counterparts of this Agreement.
- I. **Authority**. Any individual executing this Agreement on behalf of the City or Consultant represents and warrants hereby that he or she has the requisite authority to enter into this Agreement on behalf of such party and bind the party to the terms and conditions of this Agreement.
- J. **Severability**. If any of the provisions contained in this Agreement are held illegal, invalid or unenforceable, the enforceability of the remaining provisions shall not be impaired thereby. Limitations of liability and indemnities shall survive termination of the Agreement for any cause. If a part of the Agreement is valid, all valid parts that are severable from the invalid part remain in effect. If a part of this Agreement is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.
- K. **Non-exclusive Agreement**. This Agreement is non-exclusive and both the City and Consultant expressly reserve the right to enter into agreements with other Consultants for the same or similar services, or may have its own employees perform the same or similar services.

- L. **Assignment of Interest.** The duties under this Agreement shall not be assignable, delegable, or transferable without the prior written consent of the City. Any such purported assignment, delegation, or transfer shall constitute a material breach of this Agreement upon which the City may terminate this Agreement and be entitled to damages.
- M. **City Business License.** Prior to receiving a Notice to Proceed from the City, Consultant shall obtain and maintain a valid City of Carmel-by-the-Sea Business License for the duration of the Agreement. Costs associated with the license are the responsibility of Consultant.
- N. **Laws.** Consultant and its officers, employees, agents and subconsultants agree that in the performance of this Agreement it will reasonably comply with all applicable federal, state and local laws and regulations. This Agreement shall be governed by and construed in accordance with the laws of the State of California and the City of Carmel-by-the-Sea.

IN WITNESS WHEREOF, the parties enter into this Agreement hereto on the day and year first above written in Carmel-by-the-Sea, California.

CITY OF CARMEL-BY-THE-SEA

CONSULTANT

\_\_\_\_\_  
Mayor, City Administrator, or Designee Signature

\_\_\_\_\_  
Consultant Signature

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

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

\_\_\_\_\_  
Title

\_\_\_\_\_  
Title

\_\_\_\_\_  
Consultant Legal Company Name

**ATTEST:**

By: \_\_\_\_\_  
City Clerk

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

**APPROVED AS TO FORM:**

By: \_\_\_\_\_  
Glen R. Mozingo, ESQ., City Attorney

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

Exhibit "A" Scope of Services, including Key Personnel  
Exhibit "B" Fee Schedule  
Exhibit "C" Project Schedule

SAMPLE