A-12-110

AGREEMENT

This AGREEMENT ("Agreement) is made and entered into this 13th day of March, 2012, by and between the COUNTY OF FRESNO, a political subdivision of the State of California, hereinafter "COUNTY", and Durham Construction Company, Inc., hereinafter "CONTRACTOR".

WITNESSETH:

This AGREEMENT shall establish a competitively bid, fixed price, indefinite quantity,

Job Order Contract. The scope of work to be performed pursuant to this Agreement includes a

comprehensive listing of detailed repair and construction tasks and specifications that have

pre-established units of measure and unit prices listed in a Construction Task Catalog No.

912-5020 developed for the COUNTY by the Gordian Group. The work under this

AGREEMENT shall be carried out pursuant to individual Task or Job Orders and shall involve

the repair, alteration, modernization, maintenance, rehabilitation, reconstruction, or

construction of public buildings, streets, utilities, and other public works.

The obligations of all parties under this Agreement shall be as set forth in this

Agreement and detailed in COUNTY's Request for Quotation No. 912-5020,,COUNTY'S

Addendum No. One thereto and CONTRACTOR's Response to Request for Quotation No.

912-5020., all of which are attached hereto as Exhibits A , B and C, respectively and incorporated herein by reference. All capitalized terms used in this Agreement shall have the meanings attached to them as set forth in COUNTY's Request for Quotation No. 912-5020, to the extent not otherwise defined in this Agreement.

I. OBLIGATIONS OF CONTRACTOR

- A. CONTRACTOR agrees to furnish all labor and materials, including tools, implements, and appliances required, and to perform all the work in a good and workmanlike manner, free from any and all liens and claims of mechanics, material-men, subcontractors, artisans, machinists, teamsters, day-men and laborers required for completing specific Task Orders as directed by COUNTY.
- B. In accordance with the provisions of Section 1770 of the Labor Code, the Director of the Department of Industrial Relations of the State of California has determined the general prevailing rates of wages and employer payments for health and welfare, pension, vacation, travel time, and subsistence pay as provided for in Section 1773.8, apprenticeship or other training programs authorized by Section 3093, and similar purposes applicable to the work to be done. Said wages are on file with the Clerk of the Board of Supervisors, Room 301, Hall of Records, Fresno, California, and are incorporated herein by reference.

It shall be mandatory upon the CONTRACTOR herein and upon any subcontractor to pay not less than the said specified rates to all laborers, workmen and mechanics employed by them in the execution of the Contract.

CONTRACTOR shall comply with Labor Code Section 1775. In accordance with said Section 1775, the CONTRACTOR shall forfeit as a penalty to the COUNTY \$50.00 for each calendar day or portion thereof, for each workman paid less than the stipulated prevailing rates for such work or craft in which such workman is employed for any work done under the Contract by CONTRACTOR or by any subcontractor under CONTRACTOR 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 workman for each calendar day or portion thereof for which each workman was paid less than the stipulated prevailing wage rate shall be paid to each workman by the CONTRACTOR.

The CONTRACTOR and each subcontractor shall keep or cause to be kept an accurate record showing the names and occupations of all laborers, workmen and mechanics employed by him in connection with the execution of the Contract or any subcontract thereunder, and showing also the actual per diem wage paid to each of such workers, which records shall be open at all reasonable hours to inspection by the COUNTY, its officers and agents and to the representatives of the Division of Labor Law Enforcement of the State Department of Industrial Relations.

CONTRACTOR and any subcontractor under CONTRACTOR shall also comply with the provisions of Section 1777.5 and Section 1777.6 of the Labor Code concerning the employment of apprentices.

C. It is further understood and agreed that, in accordance with the provisions of Sections 1810 to 1815 of the Labor Code of the State of California, eight (8) hours labor shall constitute a day's work, but because this is a contract for public work, work performed by employees of the CONTRACTOR and each Sub-Contractor in excess of eight (8) hours per day, and forty (40) hours in any one week, shall be permitted upon compensation for all hours worked in excess of eight (8) hours per day at not less than one and one-half (1 1/2) times the basic rate of pay. The CONTRACTOR and each subcontractor shall keep an accurate record showing the names and actual hours worked of all workers employed by him in connection with the work contemplated by this Agreement, which record shall be

open at all reasonable hours to the inspection of the COUNTY or its officer or agents and to the Chief of the Division of Labor Statistics and Law Enforcement of the Department of Industrial Relations, his deputies or agents. It is hereby further agreed that said CONTRACTOR shall forfeit as a penalty to the COUNTY the sum of twenty-five dollars (\$25) for each laborer, workman employed by CONTRACTOR or any subcontractor under CONTRACTOR, for each calendar day during which such laborer or workman is required or permitted to labor more than eight (8) hours in violation of this stipulation.

The Board of Supervisors hereby specifies that portions of the work can only be performed outside the regular working hours as defined in the applicable collective bargaining agreement filed with the Director of Industrial Relations in accordance with Labor Code Section 1773.1, and that the overtime requirements for Saturdays, and holidays are hereby waived for these portions of the work, as more particularly described in the specifications. However, this exemption shall not negate the overtime provisions specified in Labor Code Section 1815.

D. All agreements between the CONTRACTOR, Sub-Contractors, and Sub-Contractors of lower tier shall be subject to the approval of the COUNTY. In no case does such approval relieve the CONTRACTOR of any conditions imposed by the Contract Documents. Sub-Contractors may be added, deleted or substituted only in accordance with the provisions of Public Contract Code Section 4100 et seq.

CONTRACTOR shall bind every Sub-Contractor by the terms of the Contract

Documents to carry out their provisions insofar as applicable to their work; and the

CONTRACTOR further agrees to pay to each Sub-Contractor promptly upon issuance of

Certificate of Payment, his/her or their due portion.

Neither the acceptance of the name of Sub-Contractor nor the suggestion of such name nor any other act of the COUNTY nor anything contained in any Contract Document shall be construed as creating any contractual relation between the COUNTY and any Sub-Contractor of any tier.

The COUNTY reserves the right to reject any proposed Sub-Contractor, installer, or supplier who cannot show satisfactory evidence of meeting the qualifications required by the Contract Documents. In the event of such rejection, the CONTRACTOR shall, within the time frame listed for submittal of revised Proposals, submit the name and qualifications of a replacement Sub-Contractor, installer or supplier satisfactory to the COUNTY. Such replacement submittal shall be in accordance with all Contract Documents. No adjustment of Proposal price shall be made in the event of such replacement.

When an individual Task Order utilizes Federal Funds and the County elects to require Disadvantaged Business Enterprise (DBE) participation, the CONTRACTOR shall follow the Federal Good Faith Effort requirements for inclusion of DBE Sub-Contractors and suppliers.

II. OBLIGATIONS OF THE COUNTY

- A. The COUNTY will identify projects and their intended results and will work with CONTRACTOR to develop scope and specifications.
- B. The COUNTY will issue a notice to proceed for each Task Order and issue any required change orders.
 - C. The COUNTY will provide inspection and acceptance of the work.

III. <u>TERM</u>

The term of this Job Order Contract is either for one year or when issued Task Orders totaling the Maximum Contract Value have been completed, whichever occurs first. All Task Orders must be issued, but not necessarily completed within one calendar year of the commencement date of this Agreement as set forth on page one.

IV. TERMINATION

- A. <u>Non-Allocation of Funds</u> The terms of this Agreement, and the services to be provided thereunder, are contingent on the approval of funds by the appropriating government agency. Should sufficient funds not be allocated, the services provided may be modified, or this Agreement terminated, at any time by giving the CONTRACTOR thirty (30) days advance written notice.
- B. <u>Breach of Contract</u> The COUNTY may immediately suspend or terminate this Agreement in whole or in part, where in the determination of the COUNTY there is:
 - 1. An illegal or improper use of funds;
 - 2. A failure to comply with any term of this Agreement;

- 3. A substantially incorrect or incomplete report submitted to the COUNTY;
- 4. Improperly performed service.

In no event shall any payment by the COUNTY constitute a waiver by the COUNTY of any breach of this Agreement or any default which may then exist on the part of the CONTRACTOR. Neither shall such payment impair or prejudice any remedy available to the COUNTY with respect to the breach or default. The COUNTY shall have the right to demand of the CONTRACTOR the repayment to the COUNTY of any funds disbursed to the CONTRACTOR under this Agreement, which in the judgment of the COUNTY were not expended in accordance with the terms of this Agreement. The CONTRACTOR shall promptly refund any such funds upon demand.

C. <u>Without Cause</u> - Under circumstances other than those set forth above, this Agreement may be terminated by COUNTY upon the giving of thirty (30) days advance written notice of an intention to terminate to CONTRACTOR.

V. COMPENSATION/INVOICING:

COUNTY agrees to pay CONTRACTOR and CONTRACTOR agrees to receive compensation for each Task Order in accordance with the CONTRACTOR's Adjustment Factors stated on the Bid Schedule set forth in CONTRACTOR'S Response to Request for Quotation No. 912-5020, which are as follows:

Normal Working Hours Adjustment Factor	0.8210	
Other than Normal Working Hours Adjustment Factor	0.9642	
Federal	0.8478	
ormal Working Hours Adjustment Factor		

Federal	0.0047
Other than Normal Working Hours Adjustment Factor	0.9817

The Minimum Contract Value is \$25,000 (twenty-five thousand dollars). The CONTRACTOR will receive Task Orders totaling a minimum of \$25,000 during the Contract term. The Maximum Contract Value is \$2,000,000 (two million dollars). The Maximum Contract Value may be increased by up to the sum authorized by Public Contract Code Section 20128.5 (currently approximately \$4,340,000). Any increase in the Maximum Contract Value will be by mutual agreement.

At no time may the sum of the outstanding Task Orders exceed the amount of the Payment Bond and Performance Bond. A Task Order is outstanding until the COUNTY has accepted the work described in the Task Order by execution of a Notice of Completion.

CONTRACTOR will not be issued Task Orders which in total exceed the Maximum Contract Value. The COUNTY does not guarantee the CONTRACTOR will receive Task Orders totaling the Maximum Contract Value.

CONTRACTOR shall submit monthly invoices per Task Order in triplicate to the County of Fresno, Facility Services.

In no event shall services performed under this Agreement be in excess of the Maximum Contract Value during the term of this Agreement. It is understood that all expenses incidental to CONTRACTOR'S performance of services under this Agreement shall be borne by CONTRACTOR.

VI. LIQUIDATED DAMAGES:

It is understood and agreed by both parties to the Contract that in case all the Work specified or indicated in the Contract Documents is not completed within the specified time frames set forth in the Task Order, or within such time limits as extended, damages will be sustained by the COUNTY in the event of and by reason of such delay. It is, and will be, impractical and extremely difficult to determine the actual damage which the COUNTY will sustain by reason of the delay. It is therefore agreed that the CONTRACTOR will pay, at a minimum, to the COUNTY the sum of money stipulated per day in the Task Order for each day's delay in completing the work beyond the time prescribed.

Application of Liquidated Damages and the value of liquidated damages will be determined by the County on a Task Order by Task Order basis. Each Task Order will state whether Liquidated Damages will be applied.

COUNTY may withhold Liquidated Damages from payments to the CONTRACTOR as such damages accrue, or, at COUNTY's discretion, withhold Liquidated Damages from any payments due or that become due pursuant to the Contract, including Retention and final payment (pursuant to California Government Code §53069.85). A credit Task Order shall be executed to assess liquidated damages.

VII. INDEPENDENT CONTRACTOR:

In performance of the work, duties and obligations assumed by CONTRACTOR under this Agreement, it is mutually understood and agreed that CONTRACTOR, including any and all of the CONTRACTOR'S officers, agents, employees and subcontractors will at all times be acting and performing as an independent contractor, and shall act in an independent capacity and not as an officer, agent, servant, employee, joint venturer, partner, or associate of the

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COUNTY. Furthermore, COUNTY shall have no right to control or supervise or direct the manner or method by which CONTRACTOR shall perform its work and function. However, COUNTY shall retain the right to administer this Agreement so as to verify that CONTRACTOR is performing its obligations in accordance with the terms and conditions thereof.

CONTRACTOR and COUNTY shall comply with all applicable provisions of law and the rules and regulations, if any, of governmental authorities having jurisdiction over matters the subject thereof.

Because of its status as an independent contractor, CONTRACTOR shall have absolutely no right to employment rights and benefits available to COUNTY employees.

CONTRACTOR shall be solely liable and responsible for providing to, or on behalf of, its employees all legally-required employee benefits. In addition, CONTRACTOR shall be solely responsible and save COUNTY harmless from all matters relating to payment of CONTRACTOR'S employees, including compliance with Social Security withholding and all other regulations governing such matters. It is acknowledged that during the term of this Agreement, CONTRACTOR may be providing services to others unrelated to the COUNTY or to this Agreement.

VIII. MODIFICATION:

Any matters of this Agreement may be modified from time to time by the written consent of all the parties without, in any way, affecting the remainder.

IX. <u>DISCREPANCIES:</u>

Should the CONTRACTOR, at any time, discover a mistake in any of the Contract Documents or any discrepancy therein or lack of appropriate information, the

CONTRACTOR shall not proceed with the work affected thereby until such correction has been made.

In resolving conflicts resulting from errors or discrepancies in any of the Contract Documents, the order of precedence shall be as follows:

- 1) Permits from other agencies as may be required by law.
- 2) Permits issued by the COUNTY.
- 3) Changes to Task Orders
- 4) Task Orders
- 5) Agreement
- 6) CONTRACTOR's Bid
- 7) Addenda
- 8) General Conditions
- 9) Technical Specifications
- 10) Construction Task Catalog
- 11) Reference Specifications
- 12) Instruction to Bidders
- 13) Notice Inviting Bids

X. NON-ASSIGNMENT:

Neither COUNTY nor CONTRACTOR shall assign, transfer or sub-contract this

Agreement nor their rights or duties under this Agreement without the prior written consent of
the other party.

XI. HOLD HARMLESS:

CONTRACTOR agrees to indemnify, save, hold harmless, and at COUNTY'S request, defend the COUNTY, its officers, agents, and employees from any and all costs and expenses, damages, liabilities, claims, and losses occurring or resulting to COUNTY in connection with the performance, or failure to perform, by CONTRACTOR, its officers, agents, employees or subcontractors under this Agreement, and from any and all costs and expenses, damages, liabilities, claims, and losses occurring or resulting to any person, firm, or corporation who may be injured or damaged by the performance, or failure to perform, of CONTRACTOR, its officers, agents, or employees under this Agreement. This indemnity shall survive the termination of this Agreement for the full period allowed by law.

XII. INSURANCE

Without limiting the COUNTY's right to obtain indemnification from CONTRACTOR or any third parties, CONTRACTOR, at its sole expense, shall maintain in full force and effect, the following insurance policies:

A. Commercial General Liability

Commercial General Liability Insurance with limits of not less than Two Million Dollars (\$2,000,000) per occurrence and an annual aggregate of Five Million Dollars (\$5,000,000). This policy shall be issued on a per occurrence basis and include coverage for, but not limited to, the hazards of premises/operations, contractual, independent contractors, advertising, product/completed operations, broad form property damage, and personal injury with a

combined single limit of not less than Two Million dollars (\$2,000,000) per occurrence.

B. Contractor's Property Damage Liability

Contractor's Property Damage Liability insurance shall name COUNTY as an additional loss payee COUNTY property as to any and include coverage for property damage caused by blasting, collapse, structural injuries or damage to underground utilities. The policy shall not contain the "x", "c", or "u" exclusions.

C. Auto Liability

Comprehensive auto liability endorsed for all owned, non-owned and hired vehicles with a combined single limit of not less than One Million dollars (\$1,000,000) per occurrence.

D. Workers Compensation

Insurance in an amount and form to meet all applicable requirements of the Labor Code of the State of California, including Employers Liability with a One Million dollars (\$1,000,000) limit, covering all persons Contractor is legally required to cover.

E. All-Risk Insurance On The Work

Contractor shall procure and maintain at Contractor's sole cost and expense, Builders Risk Course of Construction insurance, including fire and vandalism coverage, covering the entire work (including any County furnished material and equipment) against loss or damage until completion and acceptance by the County. Such insurance shall be in an amount for the replacement cost of the subject building and improvements and endorsed for broad form property damage, breach of warranty, demolition costs, and debris removal. Deductible not exceeding 5% of the cost will be permitted. Said policy to cover Contractor, Contractor's subcontractors, the County, its agents, the awarding entity, and any Trustee, under the indenture or trust agreement securing the bonds, certificates of participation, or other evidences of indebtedness issued to finance the work contemplated herein. The value of the

policy shall be in U.S. currency.

F. Bonds

Payment Bond and Performance Bonds will be in place for all Task Orders in an amount equal to the sum of any outstanding Task Orders.

CONTRACTOR shall ensure that any subcontractors or other agents used in fulfilling the terms and obligations of this Agreement shall have the same level of insurance and indemnification required of CONTRACTOR.

CONTRACTOR shall obtain endorsements to the Commercial General Liability insurance naming the County of Fresno, its officers, agents, and employees, individually and collectively, as additional insured, but only insofar as the operations under this Agreement are concerned. Such coverage for additional insured shall apply as primary insurance and any other insurance, or self-insurance, maintained by COUNTY, its officers, agents and employees shall be excess only and not contributing with insurance provided under CONTRACTOR's policies herein. This insurance shall not be cancelled or changed without a minimum of thirty (30) days advance written notice given to COUNTY.

Within Thirty (30) days from the date CONTRACTOR signs and executes this

Agreement, CONTRACTOR shall provide certificates of insurance and endorsement as stated above for all of the foregoing policies, as required herein, to the County of Fresno, (in compliance with the Notices section below), stating that such insurance coverages have been obtained and are in full force; that the County of Fresno, its officers, agents and employees will not be responsible for any premiums on the policies; that such Commercial General Liability insurance names the County of Fresno, its officers, agents and employees, individually and collectively, as additional insured, but only insofar as the operations under this Agreement are concerned; that such coverage for additional insured shall apply as primary

insurance and any other insurance, or self-insurance, maintained by COUNTY, its officers, agents and employees, shall be excess only and not contributing with insurance provided under CONTRACTOR's policies herein; and that this insurance shall not be cancelled or changed without a minimum of thirty (30) days advance, written notice given to COUNTY.

In the event CONTRACTOR fails to keep in effect at all times insurance coverage as herein provided, the COUNTY may, in addition to other remedies it may have, suspend or terminate this Agreement upon the occurrence of such event.

All policies shall be with admitted insurers licensed to do business in the State of California. Insurance purchased shall be purchased from companies possessing a current A.M. Best, Inc. rating of A FSC VII or better.

XIII. <u>AUDITS AND INSPECTIONS:</u>

The CONTRACTOR shall at any time during business hours, and as often as the COUNTY may deem necessary, make available to the COUNTY for examination all of its records and data with respect to the matters covered by this Agreement. The CONTRACTOR shall, upon request by the COUNTY, permit the COUNTY to audit and inspect all of such records and data necessary to ensure CONTRACTOR'S compliance with the terms of this Agreement.

If this Agreement exceeds ten thousand dollars (\$10,000.00), CONTRACTOR shall be subject to the examination and audit of the Auditor General for a period of three (3) years after final payment under contract (Government Code Section 8546.7).

XIV. <u>NOTICES:</u>

The persons and their addresses having authority to give and receive notices under this Agreement include the following:

COUNTY CONTRACTOR COUNTY OF FRESNO Durham Construction Company, Inc. Facility Services Manager Attn: Chris Durham, President

4590 E. Kings Canyon 1025 Holland Avenue Fresno, CA 93602 Clovis, CA 93612

Any and all notices between the COUNTY and the CONTRACTOR provided for or permitted under this Agreement or by law shall be in writing and shall be deemed duly served when personally delivered to one of the parties, or in lieu of such personal services, when deposited in the United States Mail, postage prepaid, addressed to such party.

XV. GOVERNING LAW:

Venue for any action arising out of or related to, this Agreement shall only be in Fresno County, California.

The rights and obligations of the parties and all interpretation and performance of this Agreement shall be governed in all respects by the laws of the State of California.

XVI. <u>DISCLOSURE OF SELF-DEALING TRANSACTIONS:</u>

This provision is only applicable if the CONTRACTOR is operating as a corporation (a for-profit or non-profit corporation) or if during the term of this agreement, the CONTRACTOR changes its status to operate as a corporation.

Members of the CONTRACTOR's Board of Directors shall disclose any self-dealing transactions that they are a party to while CONTRACTOR is providing goods or performing services under this agreement. A self-dealing transaction shall mean a transaction to which the CONTRACTOR is a party and in which one or more of its directors has a material financial

interest. Members of the Board of Directors shall disclose any self-dealing transactions that they are a party to by completing and signing a Self-Dealing Transaction Disclosure Form (Exhibit D and submitting it to the COUNTY prior to commencing with the self-dealing transaction or immediately thereafter.

XVII. <u>ENTIRE CONTRACT:</u>

This Agreement constitutes the entire Contract between the CONTRACTOR and COUNTY with respect to the subject matter hereof and supersedes all previous Contract negotiations, proposals, commitments, writings, advertisements, publications, and understandings of any nature whatsoever unless expressly included in this Agreement. In the event of any inconsistency in interpreting the documents which constitute this Agreement, the inconsistency shall be resolved by giving precedence in the following order of priority:

(1) the text of this Agreement (excluding Exhibits A, B and C); (2) Exhibit A:COUNTY's Request for Quotation (RFQ)No. 512-5020; (3) Exhibit B:Addendum No. One to RFQ 512-5020; and (4) Exhibit C: CONTRACTOR'S Quotation in Response to RFQ 512-5020.

1	IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed as	
2	of the day and year first hereinabove written.	
3 4	COUNTY: COUNTY OF FRESNO	CONTRACTOR: Durham Construction Company, Inc.
		() Mrs () All III.
5	By Deborah A. Poochigian	Print Name: Que is Que HAM
6	Chairman, Board of Supervisors	Print Name. CHRIS OVERHAM Title President / secretary
7		, , , , , , , , , , , , , , , , , , , ,
8	ATTEST: BERNICE E. SEIDEL, CLERK	By
9	BOARD OF SUPERVISORS	Print Name: Title:
10	BY	
11	Deputy	ISD/Facility Services FUND: 1045
12	APPROVED AS TO LEGAL FORM:	SUBCLASS: 10000 ORG No.: 8935
13	KEVIN B. BRIGGS, COUNTY COUNSEL	Acct. No.: 7295
14	By June ! Smit	Public Works and Planning
15	Deputy	1910 Capital Projects
16	APPROVED AS TO ACCOUNTING FORM: VICKI CROW, C.P.A.	1912 Capital Improvements - Grants 4510 Roads
1	AUDITOR-CONTROLLER/TREASURER-	7205 Community Development
17	TAX COLLECTOR	9015 Resources 9026 American Avenue Landfill
18	By Coli	8840 Coroner Facility
19	RECOMMENDED FOR APPROVAL:	8830 Juvenile Justice Campus 7530 Library Measure B Projects
20	RECOMMENDED FOR APPROVAL.	7530 Library Measure & Projects
21	By Gary M. Osmondson, Director of Internal	
22	Service/Chief Information Officer	
23	Internal Services Department	
24	By alon Wever	
25	Alan Weaver Director, Public Works and Planning	