

THE CITY OF
BENICIA
CALIFORNIA

REQUEST FOR PROPOSAL

Benicia Industrial Park Broadband Project

September 30, 2013

Important Dates:

Pre-bid meeting:	October 21, 2013, 10:00 a.m. Benicia City Hall 250 East L Street, Benicia, CA 94510
Proposal Due Date:	November 14, 2013, 2:00 p.m.
Selection Interviews:	November 20 and 21, 2013
Award of Agreement:	December 17, 2013
Project Start Date:	January 2, 2014

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I. INTRODUCTION

The City of Benicia ("City") is requesting proposals from qualified organizations to assist the City in the *Benicia Industrial Park Broadband Project*.

The City of Benicia is a general law city located in Solano County.

The City has determined that new industrial and commercial grade broadband infrastructure in the Benicia Industrial Park and Arsenal area (see map attached below as Exhibit A) will promote economic development in those specific areas and the City as a whole, leading to job creation, greater commercial activity, including retail, and generate additional revenue through increases in property values and the number and scale of business transactions.

The City recently completed a market assessment¹ that identified the business opportunity in these areas. In doing so, the study concluded:

- Many tenants (over 30%) believe available Internet services are inadequate for current high-bandwidth applications and almost 20% feel their connections are insufficient for even basic applications.
- Tenants intend to use Internet access within three-to-five years to run several bandwidth-intensive applications that are important to doing business nationally and internationally.
- Current Internet access services will not enable tenants to use the online business applications they foresee being important in five years.

A second study² was completed earlier this year which evaluated the options available to the City to improve industrial and commercial grade Internet access and other broadband services in the project area.

These reports are available for downloading at BeniciaBusiness.com.

The Benicia City Council has directed staff to proceed with development of a public/private partnership to create the necessary infrastructure. The purpose of this Request for Proposal (RFP) is to solicit proposals that will allow the City to pursue this Benicia Industrial Broadband Project (the Project).

The City is not soliciting proposals based on any particular design, technology, business model or solution. Any proposal presented to the City as a result of this RFP and the documents referenced herein will be the sole responsibility of the respondent.

II. SCOPE OF PROJECT

This RFP encompasses three distinct elements:

¹ *Broadband Needs Assessment for the Benicia Industrial Park*, Successful.com, 15 September 2010.

² *Benicia Industrial Broadband Project Assessment*, Tellus Venture Associates, 24 June 2013

- Technology.
- Partnership model (including financial details).
- Ongoing business model.

These elements are more fully described below. Respondents may present proposals that meet the requirements of one element, all elements or any combination of elements. Respondents submitting partial proposals must account for any gaps and describe how those gaps can be bridged.

To the extent possible, this RFP is neutral regarding technology. Although it derives from an assessment which used fiber optic-based technology as a benchmark, respondents are not required to present fiber solutions. Requirements may be met through any suitable means at the discretion and on the responsibility of the respondent.

A. City Assets

The City of Benicia has earmarked \$750,000 for investment in the Project. The City has not specified how this money will be used or what consideration it will receive in return. It is up to each respondent to propose such terms, however the City retains full and final discretion as to the terms it will accept.

The City also owns and/or controls real estate in or near the Project area, and has jurisdiction over most of the roadways. It is a major purchaser of broadband-related services and from time to time pursues capital improvement initiatives, including utility undergrounding, that might or might not be complementary to the Project. Respondents may include assumptions about the use of City assets in proposals, so long as all assumptions are fully explained. However, the City makes no representation regarding the availability or suitability of these assets, and nothing in this RFP or other material provided by the City should be interpreted to indicate otherwise.

B. Proposal Objectives

The City's goal in the Project area is to make access available to a complete range of broadband facilities and services, both bundled and unbundled, at competitive prices. At a minimum, proposals must address:

1. Availability of managed services (e.g. commercial grade DSL, T-1 or OC-3 class circuits with or without Internet connectivity).
2. Availability of unbundled broadband network elements (e.g. dark fiber, wholesale Internet bandwidth, long haul interconnects).
3. Quality of Service (QoS) standards, including reliability, and a sustainable means of guaranteeing those standards over time.
4. Development of a competitive market for broadband services and facilities within the project area, or other means of guaranteeing competitive access and pricing for the long term.
5. Economic sustainability of business and partnership models proposed for the Project area, including particularly ensuring that the Project will continue to operate as intended over time without additional financial contributions from the City.

The City's participation in the Project is not conditional on achieving a specific financial return on investment, however the public benefits generated by the Project, including economic development benefits and future revenue accruing to the City, should be consistent with the public funds contributed.

There are no specified quantitative technical or financial performance requirements. Instead, respondents must show how their solutions will meet or exceed the technical, financial and economic development results achieved in cities that have already pursued such projects.

Examples of where these benchmark systems have been deployed include Palo Alto, Santa Clara, San Leandro, Santa Monica and the Bay Area Rapid Transit District. Respondents may use other benchmark systems for purposes of comparison, but should be prepared to respond to questions that refer to these examples.

C. Technology Element

Proposals should provide details on the technology that will be deployed to meet project goals and objectives, including, where applicable, performance metrics, reliability and the economic basis for choosing it. Network components include, but are not necessarily limited to:

1. Tier 1 Internet facility access.
2. Long haul fiber interconnection facilities.
3. Metropolitan and local interconnection facilities.
4. Backhaul from the Project area to interconnection facilities.
5. Trunk and lateral connections within the Project area, including access points.
6. Connections from laterals to individual parcels and buildings.
7. Customer premise equipment requirements and specifications.
8. Where appropriate, ancillary facilities such as back up generators or equipment enclosures.
9. Network operations, including monitoring, repairs and ongoing maintenance.
10. Provisions for network expansion as the Project area and surrounding similarly zoned areas develop over time.

Technical details should be sufficient to assess the flexibility, reliability, capacity, future-proofing and completeness of the proposed solution. Capacity should be expressed both in terms of bandwidth and physical media, for example the number of fiber strands or power and spectrum specifications proposed for each component.

D. Partnership Model

The City is prepared to consider the full range of options for construction, ownership and operation of the Project, from full City ownership to full private sector ownership. **However, its preference is for a model that minimizes the City's ongoing role in the project while ensuring that sufficient public benefits are generated by its investment, including, particularly, achievement of its economic development goals.**

Respondents should provide a conceptual proposal for structuring the partnership, including partner responsibilities and revenue sharing as appropriate.

Please note that the term “partnership” is used generically herein and does not refer to any specific type of organizational form or ownership and/or management structure, and the City is not expressing a preference for one particular type of model over another.

E. Ongoing Business Model

Proposals should detail how the Project will be operated over time, including delineation of responsibilities among partners, financial responsibility and liability, operating costs of the proposed technology and a business plan summary.

The business plan summary should address:

1. Roles and responsibilities for the respondent, the City and other partners, if any, including financial responsibilities.
2. The services and facilities that will be available within the project area and otherwise accessible by customers located there.
3. The services and facilities that will be offered directly by the respondent and indirectly via third parties.
4. The means by which these services and facilities will be marketed, provisioned, supported and maintained.
5. Pricing strategy, including provisions for maintaining competitive market-based rates over time.
6. Financial performance metrics necessary to ensure project sustainability.
7. Technical performance metrics that will be used to evaluate system performance over time.
8. Operational details, for example how network operations will be managed, customer support provided and maintenance scheduled and performed.

The City is willing to consider a wide range of business models and roles within those models. However, its preference is for a model that does not involve a direct City role in ongoing operations and does provide an opportunity for competitive providers to offer services, at some level, via the system created by the Project. The City will look favorably on proposals that strike an equitable balance between its economic development goals and partners’ return on investment requirements.

F. Implementation schedule

Respondents should provide a schedule for implementing the Project. The City will look favorably upon proposals that allow for completion of construction within six to nine month of the finalization of an agreement, and commencement of service shortly thereafter. The entire Project must be constructed and operational at substantially the same time. Phased schedules, where any portion of the Project is left for future implementation, will not be acceptable.

III. PROPOSAL FORMAT

Proposals should include a description of the qualifications and capabilities of respondents, including examples of past projects, particularly of a similar nature. A summary of the financial structure and condition of the company should be included. The City reserves the right to require more extensive information during the evaluation, selection and negotiation process.

The proposal must include the name, contact information and a brief biography of the proposed project manager and the person who is the primary point of contact during the evaluation, selection and negotiation process, if different. Brief biographies of other key personnel should also be included.

The City does not wish to discourage respondents by requiring lengthy or time-consuming submissions. Proposals need not contain detailed system designs, but should include sufficient technical detail to evaluate performance and technical and financial feasibility. Proposals should not exceed 25 pages in length, however additional material such as background information on the company, resumes, general product and technology specifications or other information the respondent considers relevant may be included as an appendix. Materials that are overly elaborate or of an advertising or promotional nature are not desired.

The City reserves the right to request additional information during the evaluation process and to require more extensive and detailed information in the course of any subsequent contract negotiations.

IV. SELECTION PROCESS

A. Qualifications

All proposals received by the due date will be evaluated by the City. Only information which is received in response to the RFP or any subsequent interview or information request will be evaluated. The City will judge the responses of each proposing firm in several critical areas. Selected proposers may be invited to an oral interview.

B. Selection Criteria

The City will select the most qualified proposal based on the following factors. Responses to the RFP should address the qualities and indicators that are listed below:

1. *Ability of the Respondent to Design an Approach and Plan to Meet the Project Requirements.*

An assessment of the overall quality of the proposal. Qualities and indicators that will receive consideration include the proposer's performance in converting the Scope of Project into a plan that meets the City's objectives; the detail and clarity of the discussion as to the proposer's approach to undertaking the project; the proposer's performance in identifying any special problems or concerns which may be associated with the project

and preliminary ideas about how these obstacles should be addressed; the inclusion of any unique approaches which are designed to save time and money or increase the benefits or effectiveness of the proposed work; the demonstrated ability to work with governmental bodies; and a full understanding of applicable laws or regulations that relate to the project.

2. *Ability of the Proposer to Carry Out and Manage the Proposed Project.*

An assessment of the past experience of the organization in general. Qualities and indicators that will receive consideration include the number and types of projects the organization or its employees have completed; the variety of projects completed and a demonstration of the organization's ability to undertake this project; the general level of experience in the areas of supervision, observing and monitoring projects; the organization's ability to realize timetables and quality control objectives; and the demonstrated general ability to bring about a successful completion of the projects under the proposer's direction.

3. *Capabilities of the Organization and/or Team.*

Assessment of the capabilities of the organization and individuals that will be engaged in the project. Qualities and indicators that will receive consideration include the individual professionals who will be working on each task; the various professional, technical, and educational achievements and registration/licenses of each organization and individuals involved; the applicable experience of the proposed assigned staff; and the specific experience gained on similar projects.

4. *Current Workload of the Consultant Organization and/or Team.*

An assessment of the perceived ability of each organization to devote the necessary human resources and management attention to the project. Qualities and indicators that will receive consideration include the number and size of the projects presently being performed by each organization and the assigned staff; the status of existing projects; the past ability of the organization to deliver projects on a timely basis; and the nature of the existing projects that are behind schedule or past the completion date.

5. *The Proposer and/or Team's Proximity to the Project.*

An assessment of the geographic proximity to the project; the location of the office from which the proposed project will be administered; the perceived response time and general availability of the proposer's management to be on site; the perceived effect that project management location will have on price and the ability of the project to be completed on a timely basis; and the availability of special travel or communication plans which would effectively mitigate difficulties associated with location.

V. PROPOSAL DUE DATE, DELIVERY AND AWARD

A. Proposed Selection and Project Schedule

Tentative Selection Interviews Date: November 20 and 21, 2013

Agreement Approval Date: December 17, 2013

B. Delivery

The proposal, clearly marked with the project description, should be submitted no later than:

2:00 p.m. November 14, 2013

To the **physical addresses** below. All copies received by that time will be date and time stamped. Proposals will not be accepted after this time. Proposals should be addressed to:

City of Benicia
Mario Giuliani, Economic Development Manager
250 East L Street
Benicia, CA 94510

Faxed and emailed proposals will not be accepted.

C. Award of Contract

It is anticipated that any award of an agreement for services will be made by the Benicia City Council at their December 17, 2013 meeting.

VI. CONDITIONS OF REQUEST

A. General Conditions

The City reserves the right to cancel or reject all or a portion or portions of the Request for Proposal without notice. Further, the City makes no representations that any agreement will be awarded to any organization submitting a proposal. The City reserves the right to reject any and all proposals submitted in response to this request or any addenda thereto.

The City also reserves the right to reject any subconsultant or individual working on a consultant team and to replace the subconsultant or individual with a mutually acceptable replacement.

Any changes to the proposal requirements will be made by written addendum.

B. Liability of Costs and Responsibility

The City shall not be liable for any costs incurred in response to this Request for Proposal. All costs shall be borne by the person or organization responding to the request. The person or organization responding to the request shall hold the City harmless from any and all liability, claim or expense whatsoever incurred by or on behalf of that person or organization. All submitted material becomes the property of the City of Benicia.

The selected lead consultant will be required to assume responsibility for all services offered in the proposal whether or not they possess them within their organization. The selected lead consultant will be the sole point of contact with regard to contractual matters, including payment of any and all charges resulting from the contract.

C. Public Nature of Proposal Material

Responses to this Request for Proposal become the exclusive property of the City. At such times as a formal recommendation to award an agreement to one proposer is made to the awarding authority, all submittals received in response to this Request for Proposal become a matter of public record and shall be regarded as public records, with the exception of those elements in each submittal which are defined by the proposer as business or trade secrets and plainly marked as "Confidential," "Trade Secret," or "Proprietary" or if disclosure is required under the California Public Records Act. Any submittal which contains language purporting to render all or significant portions of the proposal "Confidential," "Trade Secret," or "Proprietary," shall be regarded as non-responsive.

Although the California Public Records Act recognizes that certain confidential trade secret information may be protected from disclosure, the City may not be in a position to establish that the information that a proposer submits is a trade secret. If a request is made for information marked "Confidential," "Trade Secret," or "Proprietary," the City will provide the proposer who submitted the information with reasonable notice to allow the proposer to seek protection from disclosure by a court of competent jurisdiction.

D. Validity

The proposer agrees to be bound by its proposal for a period of ninety (90) days commencing from the date proposals are due, during which time the City may request clarification or correction of the proposal for the purpose of evaluation. Amendments or clarifications shall not affect the remainder of the proposal, but only the portion so amended or clarified.

E. Standard Agreement

A sample agreement has been provided as Appendix B for the proposer's review and comment. If a proposer wishes to take exception to any of the terms and conditions contained in

the consultant agreement, these should be identified specifically; otherwise, it will be assumed that the proposer is willing to enter into the agreement as it is written. Failure to identify contractual issues of dispute can later be the basis for the City disqualifying a proposer. Any exceptions to terms, conditions, or other requirements must be clearly stated. Otherwise, the City will consider that all items offered are in strict compliance with the RFP, and the successful proposer will be responsible for compliance. The City will consider such exceptions as part of the evaluation process, which may constitute grounds for rejection of the proposal. The agreement will not be executed by the City without first being signed by the proposer.

F. Permits and Licenses

Proposer, and all of proposer's subconsultants, at its and/or their sole expense, shall obtain and maintain during the term of any agreement, all appropriate permits, certificates and licenses including, but not limited to, a City Business License, which will be required in connection with the performance of services hereunder.

G. Oral and Written Explanations

The City will not be bound by oral explanations or instructions given at any time during the review process or after the award. Oral explanations given during the review process and after award become binding only when confirmed in writing by an authorized City official. Written responses to question(s) asked by one proposer will be provided to all proposers who received this Request for Proposal.

H. Proposer's Representative

The person signing the proposal must be a legal representative of the firm authorized to bind the firm to an agreement in the event of the award.

I. Insurance

General liability, automobile, professional liability, and compensation insurance are required in the amount set forth in the attached sample agreement.

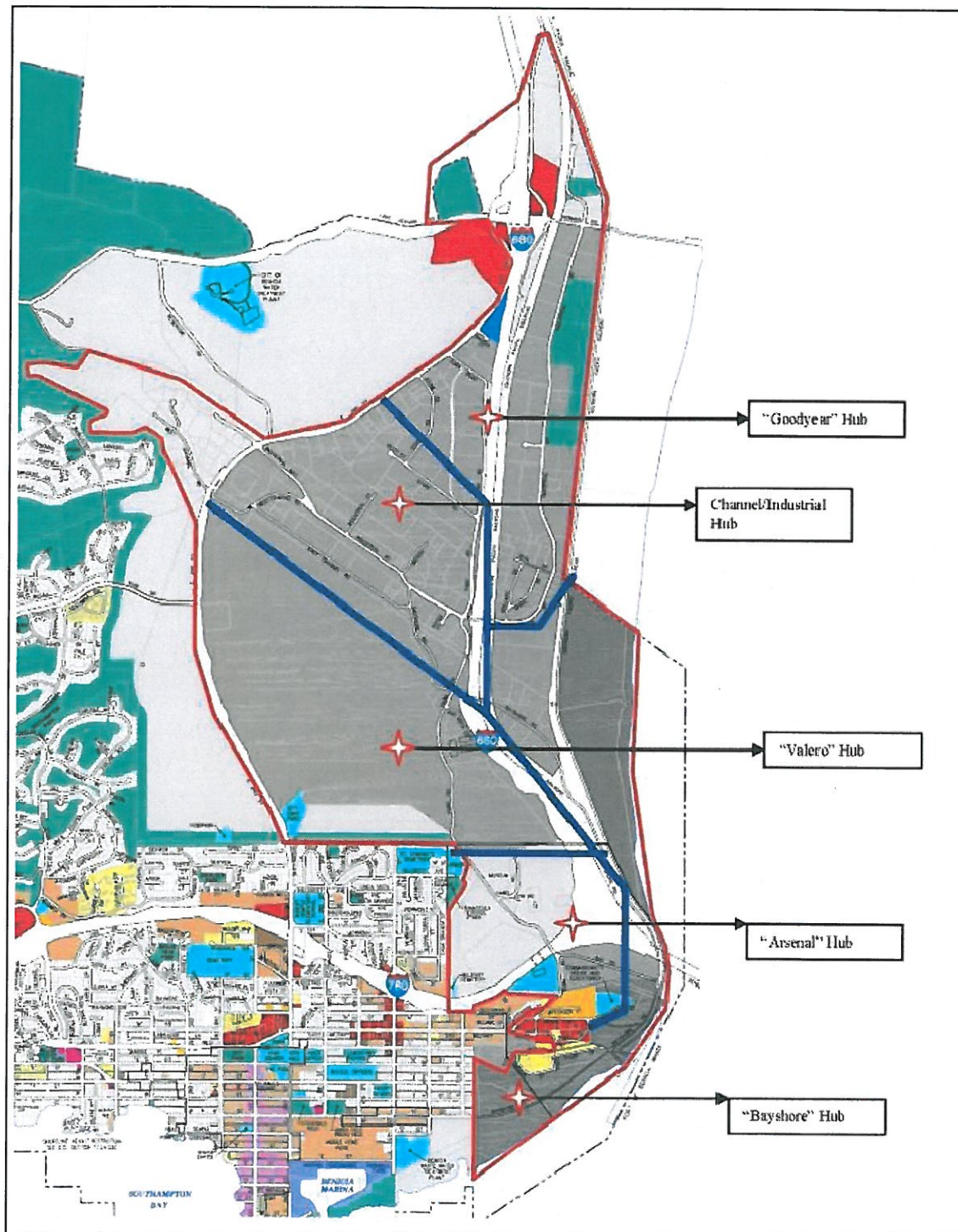
VII. AVAILABILITY OF DOCUMENTS

Copies of the two reports referenced above are available for review at the Economic Development office located at Benicia City Hall, 250 East L Street, Benicia, CA 94510.

The two reports are also available for download at: BeniciaBusiness.com

VIII. APPENDICES

A. Map of Project Area



B. Standard Contract

SAMPLE
CONSTRUCTION CONTRACT

This agreement ("Agreement") entered into _____, 20____, is between the City of Benicia, a municipal corporation (hereinafter "CITY"), and _____ a California corporation with its primary office located at _____ (hereinafter "CONTRACTOR") (collectively, "the Parties").

RECITALS:

That for and in consideration of the promises and agreements hereinafter made and exchanged, the CITY and the CONTRACTOR agree as follows:

1. That the CONTRACTOR will furnish all labor, materials, equipment, tools, transportation, services, appliances, and appurtenances for _____, (sometimes referred to as "the work") in accordance with the Plans and Specifications therefore, adopted by the City Council of the above CITY and in full accord with the provisions of the Federal, State and local codes, including all addenda and approved change orders.

2. That the CITY will pay the CONTRACTOR progress payments and the final payment, withholding 10% retention from each payment until after the lien period is over, and less any penalties and charges and in accordance with the method set forth in the Specifications with warrants drawn on the appropriate fund or funds as required, according to the prices as bid and accepted, based upon the Plans and Addenda, as follows: _____.

a. In accordance with California Public Contracts Code §22300, CONTRACTOR shall be permitted to substitute securities for any moneys to be withheld by the CITY to ensure performance under this Agreement. At the request and expense of the CONTRACTOR, securities equivalent to the amount withheld shall be deposited with the CITY, or with a state or federally chartered bank as the escrow agent, who shall then pay such moneys to the CONTRACTOR. Upon satisfactory completion of this Agreement and the passage of any requisite lien period without the filing of stop payment notices or suit, the securities shall be returned to the CONTRACTOR. Securities eligible for investment under this section shall include those listed in Section 16430 of the Government Code, bank or savings and loan certificates of deposit, interest bearing demand deposit accounts, standby letters of credit, or any other security mutually agreed to by the CONTRACTOR and the CITY. The CONTRACTOR shall be the beneficial owner of any securities substituted for moneys withheld and shall receive any interest thereon.

b. The CITY shall pay the CONTRACTOR the final payment plus any withheld retentions after the requisite lien period has passed provided: (1) no stop payment notices have been filed; (2) the CONTRACTOR is not in default hereunder; and (3) the work has been satisfactorily completed.

SAMPLE Construction Contract

3. CONTRACTOR reserves the right to modify said plans and specifications as construction progresses should unforeseen conditions occur, providing written approval is first obtained from the CITY'S Engineer and appropriate adjustments are made to the contract price. CITY reserves the right to make reasonable modifications to the plans and specifications whenever field conditions and/or public safety require such modifications. In addition, the CITY may make changes in this agreement or the plans and specifications in the course of construction to bring the completed work into compliance with environmental requirements or standards established by state or federal statutes and regulations enacted after the agreement has been awarded or entered into. The CONTRACTOR shall be paid for the changes in accordance with paragraph 22.

This agreement may be terminated for environmental considerations at the discretion of the CITY. Notice of termination of this Agreement shall be given in writing to CONTRACTOR, and shall be sufficient and complete when same is deposited in the United States mail postage prepaid and certified, addressed as set forth in paragraph 34 of this Agreement. The Agreement shall be terminated upon receipt of the Notice of Termination by CONTRACTOR. If CITY should terminate this Agreement, the CONTRACTOR shall be compensated for all work satisfactorily performed prior to time of receipt of cancellation notice, and shall be compensated for materials ordered by the CONTRACTOR or his employees, or services of others ordered by the CONTRACTOR or his employees prior to receipt of notice of cancellation whether or not such materials or final instruments of services of others have actually been delivered, provided that the CONTRACTOR or employees are not able to cancel such orders for materials or services of others. Compensation for the CONTRACTOR in the event of cancellation shall be determined by the CITY Engineer in accordance with the percentage of project completed and agreed to by the CONTRACTOR. In the event of cancellation, all notes, sketches, computations, drawings and specifications, or other data, whether complete or not, produced through the time of the CITY's last payment shall be relinquished to the CITY. The CITY may, at its own expense, make copies or extract information from any such notes, sketches, computations, drawings, and specifications, or other data whether complete or not.

4. The CITY'S Engineer and inspector shall inspect all of the improvements to be accepted for maintenance by the CITY. All improvements shall be inspected for compliance with CITY standards, plans, and specifications.

5. CONTRACTOR shall allow CITY'S duly authorized representatives access to the work at all times and shall furnish them with every reasonable facility for ascertaining that the methods, materials, and workmanship comply with the requirements and intent of the approved plans. CITY may reject defective work and require its repair, replacement, or removal by CONTRACTOR, all at the CONTRACTOR'S sole cost.

6. CITY shall not be required to exonerate any surety, release any security relating to satisfactory completion of the improvements until acceptance of proposed public improvements by the CITY or, in the case of improvements which will not be dedicated to and accepted by CITY, until the improvements have passed final inspection by CITY. In addition, release of security or

exoneration of sureties will be predicated upon the receipt of required maintenance and/or warranty agreements and security therefor.

7. No improvement shall be accepted by the CITY unless and until it is free of all liens and encumbrances, and free of all material defects and conditions which may create a hazard to the public health, safety, or welfare. In addition, all properties, rights-of-way, easements, and other interests to be dedicated to the CITY shall be, before acceptance thereof by the CITY, free and clear of all liens and encumbrances of any kind or character whatsoever and free of any and all material defects and conditions creating a hazard to public health or public safety.

8. Time is of the essence of each and every provision of this Contract.

9. CONTRACTOR will pay, and will require all SUBCONTRACTORS to pay, all workers on the work a salary or wage at least equal to the prevailing rate of per diem wages for such work as set forth in the wage determinations and wage standards applicable to this work, a copy of which is on file with the City Clerk. A copy of the prevailing rate of per diem wage shall be posted at the job site. CONTRACTOR shall forfeit to the CITY, as a penalty, TWENTY- FIVE DOLLARS (\$25.00) for each calendar day or portion thereof for each worker paid (either by CONTRACTOR or any SUBCONTRACTORS) less than the prevailing rate set forth herein on the work provided for in the contract, all in accordance with section 1775 of the Labor Code of the State of California.

10. CONTRACTOR agrees that in the performance of this Contract, not more than eight (8) hours shall constitute a day's work, and the CONTRACTOR shall not require more than eight (8) hours of labor in a day from any person employed by CONTRACTOR hereunder, except as provided in the Labor Code of the State of California. CONTRACTOR shall conform to Article 3, Chapter 1, Part 7 (Section 1810, et seq.) of the Labor Code of the State of California, and it is agreed that the CONTRACTOR shall forfeit to the CITY as a penalty the sum of TWENTY-FIVE DOLLARS (\$25.00) for each worker employed in the execution of this Contract by the CONTRACTOR or any SUBCONTRACTOR for each calendar day during which any worker is required or permitted to labor more than eight (8) hours in violation of said Article.

11. CONTRACTOR shall comply with applicable provisions of §1777.5 of the Labor Code for all apprenticeable occupations. In the event CONTRACTOR willfully fails to comply with the applicable provisions of §1777.5, CONTRACTOR shall forfeit as a civil penalty the sum of FIFTY DOLLARS (\$50.00) for each calendar day of non-compliance, which money may be withheld by CITY pursuant to the provisions of Labor Code §1777.7.

12. CONTRACTOR shall comply with the applicable provisions of §1773.8 of the Labor Code regarding the payment of travel and subsistence payments to each worker necessary to execute the work.

It shall be the responsibility of the CONTRACTOR to insure compliance with this section 12. 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 the CONTRACTOR in connection with the work described herein. The CONTRACTOR shall comply with each and every provision of Labor Code Section 1776 pertinent to said records as well as any other records governed by said Section 1776, including, but not limited to, providing copies of payroll records to employees and to the CITY, advising the CITY of the location of said records, preserving the confidentiality of the identities of individual employees, and complying with the penalty provisions of Section 1776. Specifically, in the event that the CONTRACTOR'S noncompliance with Section 1776 is evident after the ten-day period specified in subparagraph (f) of Section 1776, CONTRACTOR shall pay, as a penalty, to the CITY \$25 for each calendar day or portion thereof for each worker until strict compliance is effectuated.

13. CONTRACTOR agrees to complete the work within **three hundred sixty-five (365)** CALENDAR DAYS from the date of issuance of the Notice to Proceed (or approved extensions thereof) and to the entire satisfaction of the CITY before final payment is made. The CONTRACTOR is required to give at least one day's advance notice of the date upon which work is commenced and the date upon which the work is to be completed.

14. It is agreed that CONTRACTOR'S failure to complete the work within the time allowed will result in damages being sustained by the CITY. Such damages are, and will continue to be, impracticable and extremely difficult to determine. For each consecutive calendar day in excess of the time specified, as adjusted in accordance with standard specifications, for completion of the work the CONTRACTOR shall pay to the CITY, or have withheld from moneys due it, the sum as stipulated in the special provisions as liquidated damages. Progress payments made after the scheduled completion date shall not constitute a waiver of liquidated damages.

15. CONTRACTOR shall not discriminate in the conduct of the work under this Agreement against any employee, applicant for employment, or volunteer on the basis of race, religious creed, color, national origin, ancestry, physical or mental disability, marital status, pregnancy, sex, age, sexual orientation or other prohibited basis will not be tolerated.

Consistent with CITY'S policy that harassment and discrimination are unacceptable employer/employee conduct, CONTRACTOR agrees that harassment or discrimination directed toward a job applicant, a City employee, or a citizen by CONTRACTOR or CONTRACTOR'S employee or subcontractor on the basis of race, religious creed, color, national origin, ancestry, physical or mental disability, marital status, pregnancy, sex, age, sexual orientation or other prohibited basis will not be tolerated. CONTRACTOR agrees that any and all violation of this provision shall constitute a material breach of the Agreement.

16. CITY may withhold, or on account of later discovered evidence, nullify all or part of any certification made to the CONTRACTOR by the CITY as to the amount determined to be due

the CONTRACTOR, to such extent and period of time only as may be necessary to protect the CITY from loss on account of: defective work not remedied; claims filed or reasonable evidence indicating probable filing; failure to properly pay SUBCONTRACTORS or for material or labor; reasonable doubt that the work cannot be completed for the balance remaining; damage to third party, damage to property because of any defective works.

17. CITY shall have the option to require additional testing. However, in the event the results indicate defective work or materials, CONTRACTOR shall pay the costs of such tests and an appropriate change order shall be issued.

18. CONTRACTOR agrees that when work involves digging trenches or other excavations that extend deeper than four feet below the surface, that the CONTRACTOR shall promptly notify the public entity in writing, before conditions are disturbed, of any of the following:

a. Material that the CONTRACTOR believes may be material that is hazardous waste, as defined in Section 25117 of the Health and Safety Code, 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 at the site differing from those indicated.

c. Unknown physical conditions at the site of any unusual nature, different materially from those ordinarily encountered and generally recognized as inherent in work of the character provided for in the contract.

In the event that a dispute arises between the CITY and the CONTRACTOR as to whether the conditions materially differ or involve hazardous waste, or cause a decrease or increase in the CONTRACTOR's cost of, or time required for, performance of any part of the work, the CONTRACTOR shall not be excused from any scheduled completion date provided for by the contract, but shall proceed with all work to be performed under the contract. The CONTRACTOR shall retain any and all rights provided either by contract or by law which pertain to the resolution of disputes and protests between the CONTRACTOR and CITY.

This section of the Contract is referenced to Public Contract Code Section 7104.

19. CONTRACTOR shall, prior to the execution of the contract, furnish two bonds in a form approved by the CITY, one in the amount of One Hundred Percent (100%) of the contract price to guarantee the faithful performance of the work, and one in the amount of One Hundred Percent (100%) of the contract price to guarantee payment of all claims for labor and materials furnished. This contract shall not become effective until such bonds are supplied to and approved by the CITY.

20. To the extent permitted by law, CONTRACTOR shall indemnify, hold harmless, release and defend CITY, its officers, employees and agents from and against any and all actions,

claims, demands, damages, disability, losses, expenses including attorney's fees and other defense costs or liabilities of any nature that may be asserted by any person or entity including CONTRACTOR from any cause whatsoever including another's concurrent negligence arising out of or in any way connected with the activities of CONTRACTOR, his SUBCONTRACTOR, employees and agents hereunder and regardless of CITY's passive negligence. CONTRACTOR shall be solely responsible and save CITY harmless from all matters relative to payment of his employees including compliance with Social Security, withholding, etc.

This indemnification obligation is not limited in any way by any limitation on the amount or type of damages or compensation payable by or for CONTRACTOR under Worker's Compensation, disability or other employee benefit acts, acceptance of insurance certificates required under this agreement, or the terms, applicability or limitations of any insurance held by CONTRACTOR.

21. CONTRACTOR shall obtain insurance acceptable to the CITY in a company or companies admitted in California and with a Best rating of no less than A or as acceptable to the CITY. The required documentation of such insurance shall be furnished to the CITY at the time CONTRACTOR returns the executed contract. The proper insurance shall be provided within ten (10) days of the date of mailing of the notice that the contract has been awarded and prior to the CITY executing the contract and issuing a notice to proceed. The CONTRACTOR shall not commence work nor shall s/he allow his employees or SUBCONTRACTORS or anyone to commence work until all insurance required hereunder has been submitted and approved and a notice to proceed has been issued.

Without limiting CONTRACTOR'S indemnification provided hereunder, CONTRACTOR shall take out and maintain at all times during the life of this contract, up to the date of acceptance of the work by the CITY, the following policies of insurance:

a. Worker's Compensation insurance to cover its employees and the CONTRACTOR shall require all SUBCONTRACTORS similarly to provide Worker's Compensation insurance as required by the Labor Code of the State of California for all of the SUBCONTRACTOR'S employees. All Workers' Compensation policies shall be endorsed with the provision that it will not be cancelled without first giving thirty (30) days prior notice to the CITY.

In the event any class of employees engaged in hazardous work under this Contract is not protected under Workers' Compensation Statutes, the CONTRACTOR shall provide, and shall cause all SUBCONTRACTORS to provide, adequate and suitable insurance for the protection of its employees not otherwise protected. Such policy must be acceptable to CITY and shall provide that it will not be cancelled without first giving thirty (30) days notice to CITY.

CONTRACTOR'S worker's compensation insurance shall include the following language: "All rights of subrogation are hereby waived against the CITY of BENICIA, its officers and employees when acting within the scope of their appointment or employment."

b. General Liability insurance including bodily injury and property damage insurance for all activities of the CONTRACTOR and its SUBCONTRACTORS arising out of or in connection with this contract, written on a comprehensive general liability form including, but not limited to, Broad Form Property Damage, blanket contractual, completed operations, vehicle coverage, products liability and employers non-ownership liability coverage in an amount no less than \$1 million dollars combined, single limit personal injury and property damage for each occurrence. The completed operations and product liability insurance shall continue for not less than 365 days following acceptance of the work by CITY. Each such policy shall be endorsed with the following language:

(1) The CITY of BENICIA is named as an additional insured for all liability arising out of the operations by or on behalf of the named insured, and this policy protects the additional insured, its officers, agents and employees against liability for personal and bodily injuries, deaths or property damage or destruction arising in any respect, directly or indirectly, in the performance of the contract.

(2) The inclusion of more than one insured shall not operate to impair the rights of one insured against another insured, and the coverages afforded shall apply as though separate policies had been issued to each insured.

(3) The insurance provided herein is primary and no insurance held or owned by the City of Benicia shall be called upon to contribute to a loss.

(4) The coverage provided by this policy shall not be cancelled without thirty (30) days prior written notice given to the CITY.

(5) This policy does not exclude explosion, collapse, underground excavation hazards or removal of lateral support.

CONTRACTOR shall submit to CITY documentation of the required insurance including a Certificate of Insurance on the City of Benicia form, a copy of which is attached as Exhibit "A", signed by the insurance agent and companies named as well as properly executed endorsements, in the form attached as Exhibits "B", "C", and "D" for the additional coverages required hereunder, signed by the named insurance agent.

c. To the extent the following described damage is not covered by insurance, the CONTRACTOR shall be responsible for the cost of repairing or restoring damage to the work ("the costs"), which damage occurs prior to acceptance of the work by the CITY and the damage is determined to be proximately caused by an act of God.

(1) Notwithstanding anything to the contrary stated herein, if said act of God constitutes an earthquake in excess of a magnitude of 3.5 on the Richter Scale and/or tidal

waves, the CONTRACTOR shall be responsible for the costs in the amount of 5% of the amount paid to the CONTRACTOR hereunder.

(2) Subparagraph c(1) shall not be applicable if the work paid for by this agreement is financed by revenue bonds.

d. In the event the work involves the construction of a building, bridge or other structure, Builder's Risk "All Risk" completed value insurance coverage (including flood but unless otherwise specified in the bid documents excluding earthquake and tidal wave) upon the entire project and including completed work and work in progress. The CITY of BENICIA shall be named as an additional insured. The policy shall be endorsed to provide that it will not be cancelled without giving thirty (30) days prior written notice to CITY by mail.

e. Any deductible or self-insured retentions must be declared to and approved by CITY. At the option of CITY insurer shall reduce or eliminate such deductible or self-insured retention as respects CITY, its officers and employees or CONTRACTOR shall procure a bond guaranteeing payment of losses and related investigation, claims, administration and defense expenses.

22. Only the CITY's Engineer has the authority to allow changed or extra work which will result in additional cost to CITY. Any work done without proper authorization shall not render CITY liable to CONTRACTOR and CONTRACTOR shall not be entitled to any payment whether by means of restitution, quantum meruit or otherwise. In the event extra or changed work is duly authorized by the CITY, but agreement regarding payment is not reached with the CONTRACTOR, the CITY can, at its discretion, order CONTRACTOR to proceed with the work and CONTRACTOR shall proceed with work subject to resolution of the dispute at a later date. In the event Specifications or other documents are incorporated into this agreement which provide for procedures pertinent to changed or extra work, those other documents shall control.

23. In the event that the work is not completed to the satisfaction of CITY within the time specified by this agreement, CITY, in addition to any other remedy at law or equity, may complete such work with its own forces or by contract.

24. Neither the final certificate of payment nor any provision in the contract nor partial or entire use of the improvements embraced in this contract by the CITY or the public shall constitute an acceptance of work not done in accordance with the contract or relieve the CONTRACTOR of liability in respect to any warranties or responsibility for faulty materials or workmanship. The CONTRACTOR shall promptly remedy any defects in the work and materials and pay for the costs of any damages resulting therefrom which shall appear within a period of twelve (12) months from the date of final acceptance of the work. The CITY will give notice of defective materials and work with reasonable promptness. Before requesting acceptance of the project, the CONTRACTOR shall execute the attached guarantee that all work shall be free from defects in material and workmanship for a period of at least one year after acceptance of the work. CONTRACTOR shall also post a

guarantee bond or security in an amount of not less than 10% of the contract amount assuring corrective work required during the guarantee period. For purposes of determining the amount of the guarantee bond, "contract amount" shall mean the entire amount paid by the CITY to the CONTRACTOR under this agreement, including but not limited to, the bid amount and any change orders.

25. No material, supplies, or equipment to be installed or furnished under this contract shall be purchased subject to any chattel mortgage or under a conditional sale, lease-purchase or other agreement by which an interest therein or in any part thereof is retained by the seller or supplier. The CONTRACTOR shall warrant good title to all materials, supplies, and equipment installed or incorporated in the work and upon completion of all work, shall deliver the same together with all improvements and appurtenances constructed or placed thereon by him to the CITY free from any claims, liens, or charges. Neither the CONTRACTOR nor any person, firm or corporation furnishing any material or labor for any work covered by this contract shall have any right to a lien upon any improvement or appurtenance thereon. Nothing contained in this paragraph, however, shall defeat or impair the right of persons furnishing materials or labor to recover under any bond given by the CONTRACTOR for their protection or any rights under any law permitting such persons to look to funds due the CONTRACTOR in the hands of the CITY. The provisions of this paragraph shall be inserted in all subcontracts and material contracts and notice of its provisions shall be given to all persons furnishing materials for the work when no formal contract is entered into for such materials.

26. The CONTRACTOR shall be solely responsible and save CITY harmless for all matters relating to the payment of his/her employees, including compliance with social security, withholding and all other regulations governing such matters.

27. This Contract by reference includes the Notice Inviting Bids, Bidder's Proposal, Affidavits, Plans and Specifications, Addenda if any, and Contract Bonds, all as the term "Contract" is defined in the Specifications. All documents forming the complete contract are intended to integrate so that any condition or work called for in and one and not mentioned in another shall be executed as if mentioned in all documents and set forth in the drawings. However, in the event of any inconsistencies between such other documents and provisions of this contract, the provisions of this contract shall prevail.

28. CONTRACTOR or its SUBCONTRACTOR(S) offers and agrees to assign to the CITY all rights, title, and interest in and to all causes of action it may have under Section 4 of the Clayton Act (15 U.S.C. Sec. 15) or under the Cartwright Act (Chapter 2 (commencing with Section 16700) of Part 2 of Division 7 of the Business and Professions Code), arising from purchases of goods, services or materials pursuant to this Contract or any subcontract. This assignment shall be made and become effective at the time the CITY tenders final payment to the CONTRACTOR, without further acknowledgment by the parties.

29. Any bidder or CONTRACTOR not properly licensed with the State of California shall be subject to all legal penalties imposed by law, including, but not limited to, any appropriate disciplinary action by the Contractors State License Board.

30. Pre-Litigation Meet and Confer and Claims Procedures.

a. All claims shall be in writing, addressed and delivered as per paragraph 35, and include the documents necessary to substantiate the claim. Claims must be filed on or before the date of final payment. The claims procedures set forth herein are supplementary to other claims procedures provided for herein (e.g., change orders), but in terms of preserving the CONTRACTOR'S rights to pursue any claims by litigation, CONTRACTOR must comply with these claim procedures described in this paragraph 31 or CONTRACTOR shall be deemed to have conclusively waived and abandoned his/her/its rights to pursue any claim for which these procedures were not followed.

b. "Claim" means a separate demand by the CONTRACTOR for (A) a time extension, (B) payment of money or damages arising from work done by or on behalf of the CONTRACTOR pursuant to the contract for a public work and payment of which is not otherwise expressly provided for or the claimant is not otherwise entitled to, or (C) an amount the payment of which is disputed by the CITY.

c. For claims of less than \$50,000, the CITY shall respond in writing to a claim within forty-five (45) days of the receipt of the claim, or may request in writing, within thirty (30) days of the receipt of a claim, any additional documents supporting the claim or relating to defenses or claims the CITY may have against the CONTRACTOR. The CONTRACTOR shall supply the requested documentation within fifteen (15) days of the request therefor. The CITY'S written response to the claim, as further documented, shall be submitted to the CONTRACTOR within fifteen (15) days after receipt of the further documentation.

d. For claims above \$50,000 and up to \$375,000, the CITY shall respond in writing to all written claims within sixty (60) days of receipt of the claim, or may request in writing within thirty (30) days of receipt of the claim, any additional documentation needed to support the claim or relating to any defenses or claims the CITY may have against the CONTRACTOR. The CONTRACTOR shall deliver the requested documentation to the CITY within thirty (30) days after the receipt of the request therefor. The CITY'S written response to the claim, as further documented, shall be submitted to the CONTRACTOR within thirty (30) days after receipt of the further documentation.

e. If the CONTRACTOR disputes the CITY's written response, or the CITY fails to respond within the time prescribed, the CONTRACTOR may so notify the CITY, in writing, either within fifteen (15) days of receipt of the CITY's response or within fifteen (15) days of the CITY's failure to respond within the time prescribed, respectively, and demand an informal conference to meet and confer for settlement of the issues in dispute. Upon a demand, the CITY shall schedule a meet and confer conference within thirty (30) days for settlement of the dispute.

If the meet and confer process does not produce an agreement, the CONTRACTOR may file a claim in accordance with Public Contracts Code 20104.2(e).

31. This Agreement shall inure to the benefit of, and be binding upon, the successors in interest, legal representatives, trustees, and permitted assigns of either party.

32. This writing is intended both as the final expression of the Agreement between the parties hereto with respect to included terms and a complete and exclusive statement of the terms of the Agreement, pursuant to Code of Civil Procedure, section 1856. No modification hereof shall be effective unless and until such modification is evidenced by a writing signed by all parties to this Agreement.

33. Each party to this Agreement undertakes the obligation that the other's expectation of receiving due performance will not be impaired. When reasonable grounds for insecurity arise with respect to the performance of either party, the other may in writing demand adequate assurance of due performance and until such assurance is received may, if commercially reasonable, suspend any performance for which the agreed return has not been received. After receipt of a demand for assurance, either party's failure to provide within a reasonable time but not exceeding thirty (30) days, such assurance of due performance as is adequate under the circumstances is a repudiation of this Agreement by that party. Acceptance of any improper delivery of service or payment does not prejudice the aggrieved party's right to demand adequate assurance of future performance.

34. All notices permitted or required hereunder shall be addressed as follows and shall be deemed delivered upon the posting the notice first class, U.S. mail, postage prepaid:

If to the CITY:

Project Manager
City of Benicia
250 East L Street
Benicia, CA 94510

If to the CONTRACTOR:

35. The term of this Agreement shall commence on the effective date and shall expire two (2) years after the effective date of this Agreement unless sooner terminated pursuant to the terms of this Agreement.

The Agreement may be terminated, prior to expiration of its term, by the written mutual agreement of the parties. Upon at least ten (10) days notice, CITY reserves the right to terminate this Agreement prior to its expiration date in the event:

- a. Of any material breach by CONTRACTOR of the Agreement.

b. If CONTRACTOR fails to comply with any provision of the Agreement. In the event CONTRACTOR shall default in the performance of any of the terms, covenants, or conditions herein, CITY shall give written notice to CONTRACTOR to commence within thirty (30) days the work or action necessary to cure such default, and if CONTRACTOR fails to comply with such notice, or after such beginning shall not prosecute the same with due diligence to completion, then the City Council may declare this Agreement forfeited.

An amendment to this Agreement integrates all terms and conditions in connection with the Agreement and supersedes all negotiations and prior understandings, either oral or in writing, in respect to the subject matter of this Agreement.

A modification of this Agreement shall not be modified except by written agreement of the parties.

36. This Agreement shall be construed in accordance with the law of the State of California. Venue shall be in the County of Solano.

[SIGNATURES ON FOLLOWING PAGE]

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed on the day and year written above .

COMPANY

CITY OF BENICIA

BY: _____
NAME

BY: _____,
City Manager

DATED: _____

DATED: _____

(Attach Notary Acknowledgement)

RECOMMENDED FOR APPROVAL

Department Head

APPROVED AS TO FORM

City Attorney

Attachments: Exhibits "A", "B", "C" and "D"
Performance and L & M Bonds (Construction)
Guarantee

SAMPLE Construction Contract