

CITY OF FULLERTON

AGREEMENT

THIS AGREEMENT, made and entered into at Fullerton, California, by and between the City of Fullerton, a municipal corporation, hereinafter designated as the *Contracting Agency*, and

**ONYX PAVING COMPANY, INC.
2890 E. LA CRESTA AVE
ANAHEIM, CA 92806**

hereinafter designated as *the Contractor*,

WITNESSETH: That the parties hereto have mutually covenanted and agreed, and by these presents do covenant and agree with each other as follows:

ARTICLE I

That this Contract consists of this Agreement and the Invitation to Bid, the Instructions to Bidders, Notice to Bidders, Special Provisions, the Bid Security Forms for Check or Bond, the Accepted Bid, the Performance Bond, the Labor and Material Bond, the Non-Collusion Affidavit, the Specifications, the Drawings, all addenda as prepared prior to date of bid opening setting forth any modifications or interpretations of any of said documents and any and all supplemental agreements heretofore or herewith executed amending or extending the work contemplated and which may be required to complete the work in a substantial and acceptable manner, all of which are referred to as the Contract Documents. All of the provisions of all of said Contract Documents are hereby incorporated in and made a part of this Agreement as if fully set forth herein.

ARTICLE II

For and in consideration of the payments and agreements to be made and performed by *the Contracting Agency* as set forth in said Contract Documents, *the Contractor* agrees with *the Contracting Agency* to do the work and furnish the materials in accordance with the said Contract Documents, which work is generally referred to as

MAPLE AVENUE STREET IMPROVEMENTS PROJECT , and

to furnish at his own cost and expense all tools, equipment, services, labor, and materials necessary therefor, and to do everything required herein and by said Contract Documents.

ARTICLE III

For, and only in the event of, the furnishing of all the said services and materials, the obtaining of all permits and licenses of a temporary nature; the furnishing and removing of all debris and temporary work structures and temporary work installations, tools and equipment, and the doing of all of the work contemplated and embraced in the said Contract Documents, also in full payment for all loss and damage arising out of the nature or performance of the aforesaid work during its progress or prior to its acceptance, from the action of the elements, and from any unforeseen difficulties which may arise or be encountered in the prosecution of the work, and from all other risks of any description connected with the said work, also in full payment for all expenses incurred by or in consequence of the suspension or discontinuation of the said work,

except such as in the said Contract Documents are expressly stipulated to be borne by the *Contracting Agency* and for well and faithfully completing the work and the whole thereof within the stipulated time and in the manner shown and described in the said Contract Documents and in accordance with the requirements of the Director of Public Works of said City under them; the *Contracting Agency* will pay, and *the Contractor* shall receive, in full, compensation therefor, the prices set forth in the Accepted Bid.

ARTICLE IV

The Contracting Agency hereby promises and agrees with the said *Contractor* to employ, and does hereby employ the said *Contractor* to provide the material and to do the work according to the terms and conditions contained and referred to in the said Contract Documents for the price aforesaid, and hereby contracts to pay the same at the time, in the manner, and upon the conditions set forth in the said Contract Documents, and that the obligations and benefits of this Contract shall be binding upon and inure to the benefit of the parties hereto and their heirs, executors, administrators, successors and assigns.

ARTICLE V

No work, services, material, or equipment shall be performed or furnished under this Agreement unless and until a notice to proceed has been given in writing to *the Contractor* by *the Contracting Agency*, which notice shall be given by the Director of Public Works of the said City, and *the Contractor* shall commence work within five calendar days from the date specified in a written notice to proceed.

ARTICLE VI

If applicable, Contractor and all subcontractors are required to pay the general prevailing wage rates of per diem wages and overtime and holiday wages determined by the Director of the Department of Industrial Relations under Section 1720 et seq. of the California Labor Code and implemented by the City Council of the City of Fullerton. The Director's determination is on file and open to inspection in the office of the City Clerk and is referred to and made a part hereof; the wage rates therein ascertained, determined, and specified are referred to and made a part hereof as though fully set forth herein.

By Resolution No. 6173, the City Council adopted the general prevailing rate of per diem wages as determined and published by the State Director of the Department of Industrial Relations, pursuant to Sections 1770, 1773, and 1773.1 of the California Labor Code. Copies of these rates, the Federal Wage Rates, and the latest revisions thereto are on file in the office of the City Engineer and are available for review upon request. The contractor shall also comply with Sections 1771, 1774, 1775, 1776, 1777.5, 1813, and 1815 as required by the California Labor Code.

In addition, Contractor is required to post all job-site notices prescribed by law or regulation (Labor Code § 1771.4(a) (2)) and this contract is subject to compliance monitoring and enforcement by the California Department of Industrial Relations (Labor Code § 1771.4(a) (2))

Contractor shall keep, make available, and submit to the Engineer upon request, certified payroll records as prescribed in Labor Code §1776.

ARTICLE VII

Apprentices: Attention is directed to sections 1777.5, 1777.6 and 1777.7 of the California Labor Code concerning the employment of apprentices by the contractor or any such subcontractor under him. Contractor must comply with the statutory requirements relating to the employment of apprentices.

ARTICLE VIII

This Agreement shall be governed by and construed in accordance with laws of the State of California. Specifically, Government Code Section 9204 (A summary of which is attached hereto as Attachment "A"). If any disputed portion of the claim is not resolved with the procedure set forth in Attachment "A", prior to commencing suit in a court of competent jurisdiction, any unresolved portion of any controversy, dispute or claim arising out of the Agreement shall first be submitted to an alternative dispute resolution process as set forth in the following paragraph herein. Any action at law or in equity brought by either of the parties hereto for the purpose of enforcing a right or rights provided for by this Agreement shall be tried in a court of competent jurisdiction in the County of Orange, State of California. In the event either party hereto shall bring suit to enforce any term of this Agreement or to recover any damages for and on account of the breach of any term or condition of this Agreement, it is mutually agreed that the prevailing party in such action shall recover all costs thereof, including reasonable attorneys' fees, to be set by the court in such action.

In the event that there is any controversy, dispute or claim arising out of or relating to this Agreement, which have not been resolved pursuant to the process outlined in Attachment "A", the parties hereto shall consult and negotiate with each other and, recognizing their mutual interest, attempt to reach a solution satisfactory to both parties. If they do not reach settlement within a period of 60 days, the matter shall be submitted to nonbinding arbitration ("Process") by written notice from either party to the other. The parties shall meet and confer in good faith and select an arbitrator that is agreeable to both sides. The Process shall be completed no later than 120 days ("Process Period") after tender of the aforementioned written notice, unless the Parties mutually agree to an extension of the Process Period. If the matter is not successfully resolved by the Process, within the Process Period, the parties are free to commence litigation in a court of competent jurisdiction as defined in previous paragraph herein. Any litigation commenced without both parties' consent prior to the end of the Process Period, shall be subject to a stay until the end of the Process Period. The Parties further agree to equally bear the cost of the Process.

ARTICLE IX

The Contracting Agency will provide Contractor timely notification of the receipt of any third party claim related to the contract (Pub. Cont. Code §9201(b)). *The Contracting Agency* is entitled to recover its reasonable costs incurred in providing the notification (Pub. Cont. Code §9201(c)).

ARTICLE X

The Contracting Agency shall comply with Pub Cont. Code §20104.50 as follows:

20104.50.

(a) (1) It is the intent of the Legislature in enacting this section to require all local governments to pay their contractors on time so that these contractors can meet their own obligations. In requiring prompt payment by all local governments, the Legislature hereby finds and declares

that the prompt payment of outstanding receipts is not merely a municipal affair, but is, instead, a matter of statewide concern.

(2) It is the intent of the Legislature in enacting this article to fully occupy the field of public policy relating to the prompt payment of local governments' outstanding receipts. The Legislature finds and declares that all government officials, including those in local government, must set a standard of prompt payment that any business in the private sector which may contract for services should look towards for guidance.

(b) Any local agency which fails to make any progress payment within 30 days after receipt of an undisputed and properly submitted payment request from a contractor on a construction contract shall pay interest to the contractor equivalent to the legal rate set forth in subdivision (a) of Section 685.010 of the Code of Civil Procedure.

(c) Upon receipt of a payment request, each local agency shall act in accordance with both of the following:

(1) Each payment request shall be reviewed by the local agency as soon as practicable after receipt for the purpose of determining that the payment request is a proper payment request.

(2) Any payment request determined not to be a proper payment request suitable for payment shall be returned to the contractor as soon as practicable, but not later than seven days, after receipt. A request returned pursuant to this paragraph shall be accompanied by a document setting forth in writing the reasons why the payment request is not proper.

(d) The number of days available to a local agency to make a payment without incurring interest pursuant to this section shall be reduced by the number of days by which a local agency exceeds the seven-day return requirement set forth in paragraph (2) of subdivision (c).

(e) For purposes of this article:

(1) A "local agency" includes, but is not limited to, a city, including a charter city, a county, and a city and county, and is any public entity subject to this part.

(2) A "progress payment" includes all payments due contractors, except that portion of the final payment designated by the contract as retention earnings.

(3) A payment request shall be considered properly executed if funds are available for payment of the payment request, and payment is not delayed due to an audit inquiry by the financial officer of the local agency.

(f) Each local agency shall require that this article, or a summary thereof, be set forth in the terms of any contract subject to this article.

ARTICLE XI

Trenching Requirements. Any public works contract which involves digging trenches or other excavations that extend deeper than four feet below the surface shall comply with the following:

Contractor:

Contractor shall promptly, and before the following conditions are disturbed, notify the local public entity, in writing, of any:

- a. Material that the contractor believes may be material that is hazardous waste, as defined in Section 25117 of the Health and Safety Code, which 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 by information about the site made available to bidders prior to the deadline for submitting bids.
- 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.

The Contracting Agency:

The Contracting Agency shall promptly investigate the conditions, and if it finds that the conditions do materially so differ, or do involve hazardous waste, and cause a decrease or increase in the contractor's cost of, or the time required for, performance of any part of the work shall issue a change order under the procedures described in the contract.

Dispute:

In the event that a dispute arises between *the Contracting Agency* and the Contractor 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 contracting parties.

IN WITNESS WHEREOF, the parties hereto have caused this Contract to be executed
this _____ day of _____, 20____.

CITY OF FULLERTON

Mayor

Contractor

ATTEST:

By _____

City Clerk

Title

CONTRACTING AGENCY

and _____

Title

License No. _____

APPROVED AS TO FORM:

By: _____
Richard D. Jones, City Attorney

ATTACHMENT “A”

SUMMARY OF PUBLIC CONTRACT CODE § 9204

A “claim” is a separate demand on the City by a contractor on a public works project and sent by registered mail or certified mail with return receipt requested, for one or more of the following:

- A time extension, including relief from penalties for delay;
- Payment by the City of money damages under the terms of the contract;
- Payment of an amount that is disputed by the City.

Initial Review

The claim must be supported by appropriate documentation. The City has 45 days within which to review the claim and provide the contractor with a written statement identifying the disputed and undisputed portions of the claim. If the City does not issue a written statement, the claim is deemed rejected in its entirety. The City will pay any undisputed portion of the claim within 60 days of issuing the statement.

Meet & Confer

If the contractor disputes the City’s written response, or if the City does not issue one, the contractor may request in writing an informal conference to meet and confer for possible settlement of the claim. The City will schedule the meet and confer conference within 30 days of this request and provide a written statement identifying the remaining disputed and undisputed portions of the claim within 10 business days of the meet and confer. The City will pay the undisputed portion within 60 days of issuing this statement.

Mediation

With respect to any disputed portion remaining after the meet and confer, the City and contractor must submit the matter to nonbinding mediation, agree to a mediator within 10 business days after issuing the written statement, and share mediation costs equally. If mediation is unsuccessful, then the terms of the public works agreement and applicable law will govern resolution of the dispute.

Miscellaneous Provisions

Amounts not paid by the City in a timely manner bear interest at 7% per annum. Subcontractors may submit claims via this procedure through the general contractor. The City and contractor may waive the requirement to mediate, but cannot otherwise waive these claim procedures.