

**NON-EXCLUSIVE COMMODITY AGREEMENT
BETWEEN CITY OF TEMECULA AND ALL AMERICAN ASPHALT
FOR HOT MIX ASPHALT AND SS1H EMULSION TACK**

THIS AGREEMENT is made and effective as of **January 14, 2020**, between the City of Temecula, a municipal corporation (hereinafter referred to as "City"), and **All American Asphalt, a Corporation** (hereinafter referred to as "Vendor"). In consideration of the mutual covenants and conditions set forth herein, the parties agree as follows:

1. TERM

This Agreement shall commence on **January 14, 2020**, and shall remain and continue in effect until tasks described herein are completed, but in no event later than **June 30, 2024**, unless sooner terminated pursuant to the provisions of this Agreement.

2. PURCHASE OF GOODS

Vendor recognizes and agrees that this Agreement is for the purpose of establishing a contractual relationship between the City and the Vendor for the non-exclusive procurement of retail goods as specified on Exhibit A, attached hereto and incorporated herein as though set forth in full. The Vendor understands this Agreement is non-exclusive and the City reserves the right to purchase similar goods from other vendors.

3. PURCHASE PRICE

The City agrees to pay the Vendor for merchandise ordered and received with an annual amount not to exceed **Seventy-Five Thousand Dollars (\$75,000)** each fiscal year, for a total **Agreement amount of Three Hundred Seventy-Five Thousand Dollars (\$375,000)** for the total term of this agreement unless additional payment is approved as provided in this Agreement. Vendor will submit invoices monthly for actual merchandise ordered and received. Invoices shall be submitted between the first and fifteenth day of each month for merchandise delivered and accepted. Payment will be made within thirty (30) business days following the receipt of invoice as to all non-disputed fees. The not to exceed purchase amount listed herein is an estimated expenditure and this Agreement does not guarantee Vendor this amount in purchases.

4. REPRESENTATION AND WARRANTIES OF VENDOR

Vendor makes the following representations and warranties to City:

a. Authority and Consents. Vendor has the right, power, legal capacity and authority to enter into and perform its obligations under this Agreement. No approvals or consents of any persons are necessary in connection with Vendor's execution, delivery and performance of this Agreement, except for such as have been obtained on or prior to the date hereof. The execution, delivery and performance of this Agreement by Vendor have been duly authorized by all necessary action on the part of Vendor and constitute the legal, valid and binding obligations of Vendor, enforceable against Vendor in accordance with their respective terms.

b. Title, License and Operating Condition. Vendor has good and marketable title to all of the merchandise. All of the merchandise are free and clear of any restrictions on or mortgages, liens, pledges, charges, encumbrances, equities, claims, covenants, conditions, and restrictions except for such as may be created or granted by City. All of the merchandise is in good condition, free of any defects, and are in conformity with the specifications, descriptions, representations and warranties set forth in the Vendor's catalog, website, retail store, quote or in the Agreement Documents that may be attached hereto or incorporated herein.

c. Full Disclosure. None of the representations and warranties made by Vendor in this Agreement contains or will contain any untrue statements of a material fact, or omits to state a material fact necessary to make the statements made, in light of the circumstances under which they were made, not misleading.

5. TIME OF DELIVERY

The date and time of delivery of the merchandise shall be stated at time of order. The merchandise shall be delivered to the City location as stated on the purchase order or at time of merchandise order.

6. RISK OF LOSS

Risk of loss, damage and destruction of the merchandise shall remain with the Vendor until after inspection and acceptance of the merchandise by City.

7. INSPECTION AND ACCEPTANCE

City shall inspect the merchandise at the time and place of delivery. Such inspection may include reasonable review by City. If in the determination of the City, the merchandise fails to conform to the Agreement IN ANY MANNER OR RESPECT, City shall so notify Vendor within ten (10) days of delivery of the merchandise to City. Failing such notice, the merchandise shall be deemed accepted by City as of the date of receipt.

8. REJECTION

In the event of such notice of non-conformity by City pursuant to the section entitled "Inspection and Acceptance" above, City may, at its option, (1) reject the whole of the Merchandise, (2) accept the whole of the Merchandise, or (3) accept any commercial unit or units/portions of the Merchandise and reject the remainder. The exercise of any of the above options shall be "without prejudice" and with full reservation of any rights and remedies of City attendant upon a breach. In the event of such notice and election by City, City agrees to comply with all reasonable instructions of Vendor and, in the event that expenses are incurred by City in following such instructions, Vendor shall indemnify City in full for such expenses.

9. NO REPLACEMENTS OF CURE

This Agreement calls for strict compliance. Vendor expressly agrees that both the Merchandise tendered and the tender itself will conform fully to the terms and conditions of the Agreement on the original tender. In the event of rejection by City of the whole of the Merchandise or any part thereof pursuant to the section entitled "Rejection" above, City may, but is not required to, accept any substitute performance from Vendor or engage in subsequent efforts to affect a cure of the original tender by Vendor.

10. NON-ASSIGNABILITY

The Vendor shall not assign the performance of this Agreement, nor any part thereof, nor any monies due hereunder, without prior written consent of the City.

11. INDEPENDENT CONTRACTOR

The Vendor is and shall at all times remain as to the City a wholly independent contractor. The personnel performing the Work under this Agreement on behalf of the Vendor shall at all times be under Vendor's exclusive direction and control.

12. LEGAL RESPONSIBILITIES

The Vendor shall keep itself informed of State and Federal laws and regulations, which in any manner affect those employed by it or in any way affect the performance of its service pursuant to this Agreement. The Vendor shall at all times observe and comply with all such laws and regulations. The City, and its officers and employees, shall not be liable at law or in equity occasioned by failure of the Vendor to comply with this section.

13. INDEMNIFICATION

Vendor agrees to defend, indemnify, protect, and hold harmless, the City of Temecula, Temecula Community Services District, and/or the Successor Agency to the Temecula Redevelopment Agency, and its officers, officials, employees, agents, and volunteers, from and against any and all claims, demands, losses, defense costs or expenses, actions, liability or damages of any kind and nature which the City of Temecula, Temecula Community Services District, and/or the Successor Agency to the Temecula Redevelopment Agency, its officers, agents, employees, and volunteers may sustain or incur or which may be imposed upon them for injury to or death of persons, or damage to property arising out of Vendor's negligent or wrongful acts or omissions arising out of or in any way related to the Work or the Vendor's performance or non-performance of this Agreement, excepting only liability out of the sole negligence of the City of Temecula, Temecula Community Services District, and/or the Successor Agency to the Temecula Redevelopment Agency.

14. TERMINATION OR SUSPENSION

This Agreement may be terminated or suspended at any time, for any reason, with or without cause at the sole and exclusive discretion of the City Manager, without default or breach of this Agreement by the City.

15. SURVIVAL OF REPRESENTATIONS AND WARRANTIES

All representations, warranties, covenants and agreements of the parties contained in this Agreement shall survive the execution, delivery and performance of this Agreement.

16. REMEDIES

The remedies and rights conferred on the City by this Agreement are in addition to and cumulative with all other remedies and rights accorded the City under law or equity.

17. SEVERABILITY

If any provision of this Agreement is held invalid or unenforceable by any court of final jurisdiction, it is the intent of the parties that all other provisions of this Agreement be construed to remain fully valid, enforceable, and binding on the parties.

18. GOVERNING LAW

This Agreement shall be construed in accordance with, and governed by, the laws of the State of California as applied to contracts that are executed and performed entirely in California. The City and Vendor understand and agree that the laws of the State of California shall govern the rights, obligations, duties, and liabilities of the parties to this Agreement and also govern the interpretation of this Agreement. Any litigation concerning this Agreement shall take place in the municipal, superior, or federal district court with geographic jurisdiction over the City of Temecula. In the event such litigation is filed by one party against the other to enforce its rights under this Agreement, the prevailing party, as determined by the court's judgment, shall be entitled to reasonable attorney fees and litigation expenses for the relief granted.

19. ENTIRE AGREEMENT

This is the entire agreement between the parties regarding the commodities purchased by this Agreement. Any modification or amendment of this Agreement shall not be effective unless in writing and assigned by the parties to this Agreement.

20. AUTHORITY TO EXECUTE THIS AGREEMENT

The person or persons executing this Agreement on behalf of the Vendor warrants and represents that he or she has the authority to execute this Agreement on behalf of the Vendor and has the authority to bind the Vendor to the performance of its obligation hereunder. The City Manager is authorized to enter into an amendment on behalf of the City to make the following non-substantive modifications to the agreement: (a) name changes; (b) extension of time; (c) non-monetary changes in scope of work; (d) agreement termination.

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

CITY OF TEMECULA

ALL AMERICAN ASPHALT

(Two Signatures of corporate officers required unless corporate documents authorize only one person to sign the agreement on behalf of the corporation.)

By: _____
James Stewart, Mayor

By: _____
Mark Luer, President

ATTEST:

By: _____
Randi Johl, City Clerk

By: _____
Michael Farkas, Secretary

APPROVED AS TO FORM:

By: _____
Peter M. Thorson, City Attorney

VENDOR:

All American Asphalt

Contact Person: Edward J. Carlson

400 E. Sixth St. Corona, CA 92878

Phone Number: (951) 736-7600

Fax Number: (951) 736-7646

ecarlson@allamericanasphalt.com

PM Initials: 

Date: 12/19/17

EXHIBIT A

DESCRIPTION AND PRICE LIST OF MERCHANDISE

Cost shall be as per Vendor price listing outlined below.

In any event, the cost of such services or purchase, while not guaranteed per Section 3 of this Agreement, shall not exceed \$375,000 for the total term of the Agreement.

Type	Item Code	UOM	Qty	Unit Price	Line Total	Discount	Comment
Unnamed Section							
1	B5X						
	Reg-Hot Mix 64-10	Tons	1	\$60.7500	\$60.7500	\$60.7500	Plus Tax. Haul Rate: \$11.00 per ton Based on 20 Tons
2	B7X						
	Sheet Mix/Schlrmb	Tons	1	\$75.7500	\$75.7500	\$75.7500	Plus Tax. Haul Rate: \$11.00 per ton Based on 20 Tons
3	B9H						
	Cold Mix 3/8" SC8	Tons	1	\$75.7500	\$75.7500	\$75.7500	Plus Tax. Haul Rate: \$11.00 per ton Based on 20 Tons
4	BM1						
	SS1H/GAL	Gals	1	\$6.5000	\$6.5000	\$6.5000	Plus Tax. FOB Pickup Corona
5	BM2						
	SS1H/4.5 Gal Bucket	Each	1	\$35.5000	\$35.5000	\$35.5000	Plus Tax. FOB Pickup Corona
				Subtotal	\$254.2500	\$254.2500	
				Total	\$254.2500	\$254.2500	