

**AMENDED AND RESTATED
MEMORANDUM OF UNDERSTANDING**

The purpose of this Amended and Restated Memorandum of Understanding (MOU) is to document the agreement between the City of Santa Rosa, a municipal corporation (CITY) and Calgon Carbon UV Technologies LLC, a Delaware limited liability company (Supplier) to supply the Ultraviolet (UV) Light Disinfection System (System or UV System) for the Laguna Treatment Plant (LTP) Disinfection Improvements Project (Project).

This MOU supersedes and replaces in full the initial MOU entered into by the parties on November 17, 2016.

This MOU references other documents, which are considered integral parts of this MOU. All requirements embodied in the referenced documents are incorporated herein and made part of this MOU.

The CITY issued a Request for Proposal, Ultraviolet Light Disinfection Equipment Procurement, RFP 16-71 on September 22, 2016 (Initial RFP), which is incorporated herein by reference, and received a proposal from Supplier dated October 17, 2016 (Initial Proposal), which formed the basis of the initial MOU. The initial term for purchase to avoid price escalation expired on May 17, 2018.

The CITY issued an Updated Price Request on December 24, 2019, which modified the initial RFP (hereinafter referred to as the Updated RFP, attached hereto as Exhibit A). The CITY received a revised proposal from Supplier dated March 23, 2020 (Revised Proposal). The Initial Proposal and the Revised Proposal are hereinafter referred to collectively as the Proposal (Exhibit B).

This MOU is intended to create a binding commitment between the Supplier and the CITY for acquisition of the System by CITY's contractor from Supplier pursuant to the terms and conditions of this MOU.

AGREEMENT

ARTICLE 1 - DUTIES OF SUPPLIER

Supplier shall have the following duties under this MOU:

- a. Prepare submittals for the CITY pursuant to the Technical Specifications and Appendix A Drawings set forth in the Updated RFP (Exhibit A), the Proposal (Exhibit B), and this MOU. The initial submittals shall be delivered to the CITY within four (4) weeks after execution of an agreement for professional services with the CITY as identified in the RFP. In the event of a conflict between any of the foregoing reference documents, the order of precedence shall be as follows: MOU, Updated RFP, Proposal.
- b. Provide coordination with the CITY in their completion through the final design of the UV System.
- c. Provide equipment supply bids to the general contractors bidding on the Project that are identical to, and in accordance with, the RFP, the terms and conditions of the MOU and, the Proposal, as amended to include Supplier's Best and Final Offer pursuant to Section 00200, Article 2 of the RFP. The terms and conditions offered to the general contractors shall be those customary in the California public works industry, to the extent the terms and conditions are not specifically addressed herein.

- d. Deliver the UV System consistent with this MOU and approved submittals according to a schedule mutually agreed upon with the CITY's contractor and no later than 30 weeks from receipt of notice for purchase from CITY's contractor.
- e. Provide preliminary operation and maintenance (O&M) manuals with storage and installation requirements prior to delivery of the UV System. Provide preliminary and final O&M manuals and training to the CITY for operation of the UV System in accordance with the Technical Specifications in the RFP.
- f. Meet other commercial warranty and risk management requirements set forth in the RFP and this MOU.

ARTICLE 2 • CITY OBLIGATIONS

Should the CITY undertake construction of the Project, it will competitively bid the public works contract in early 2021 to include installation of the UV System at the LTP, located at 4300 Llano Road, Santa Rosa, CA. The CITY agrees that subject to the conditions below, it shall award the public works construction contract to the lowest responsible and responsive bidder consistent with California law and the CITY Code. As addressed herein, the CITY shall complete design of the Project so as to accommodate the Supplier's UV System and shall require CITY's contractor to purchase and install Supplier's UV System. The CITY shall further require that CITY's contractor obtain the UV System equipment from Supplier in full compliance with the price and payment terms set forth in this MOU.

This obligation to obtain the UV System from Supplier shall be conditioned upon the award of the construction contract for the Project, and the favorable result of any legal challenge to this process which could result in a court order or judgment preventing the CITY from either executing the construction contract for the Project or requiring CITY's contractor to install Supplier's UV System equipment. If CITY fails to proceed with the Project, is prevented from entering into the construction contract, or is prevented by legal proceedings from designating Supplier's UV System equipment for inclusion in CITY's Project, CITY shall not be liable to Supplier for any damages including, but not limited to restocking, proposal preparation and contracting costs, or loss of prospective profit.

ARTICLE 3 • PRICE

The UV System and equipment shall be manufactured, insured, and delivered for the sum of not to exceed \$ 5,720,700 dollars in US currency, exclusive of California sales tax, as provided in Exhibit A of this MOU, which includes the contract amount of \$86,000 to be paid pursuant to a separate agreement for professional services to cover design assistance to the City. This total amount shall be inclusive of all payments for the Supplier's costs including those costs set forth below.

Total Equipment Supply Cost	\$ (US) <u>5,634,700</u> To be provided by the CITY to all bidders Amount is equal to the Total Proposal Cost (less the Shop Drawing and Design Assistance Cost of \$86,000)
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- a. The price set forth herein shall reflect shipping F.O.B. to the LTP. CITY's contractor will not accept C.O.D. shipments. Supplier shall be responsible for payment of all charges for handling, shipping, packaging, wrapping, bags, container, boxing, crating, labeling, customs and duties, insurance and other related matters
- b. Supplier agrees to offer all bidders on the Project the equipment in accordance with this MOU, as amended to include Supplier's Best and Final Offer pursuant to Section 00200, Article 2 of the RFP and as more specifically set forth in the specifications and approved Appendix A Drawings, at the proposed price and without additional terms and conditions inconsistent with this MOU. Any such additional terms and conditions offered to contractors, not inconsistent with the terms of this MOU, shall be those customary to the public works industry in California and in Santa Rosa, and offered at no additional cost.
- c. California Sales Tax (if applicable) will be added at the prevailing rate at time of invoicing.

ARTICLE 4- PAYMENT TERMS AND PRICE ESCALATION

The CITY agrees to include the proposed price for the System and the following payment terms in its invitations for bids on the Project:

1. *75 percent of the sum set forth above on delivery of the UV System to site and acceptance by CITY's contractor. This payment will include payment for all equipment included with the UV System.*
2. *15 percent on installation of the UV System.*
3. *10 percent on successful completion of performance testing, submittal and approval of O&M manual, training of CITY's employees and upon completion of the UV System and final acceptance of the UV System by the City.*

The partial payments set forth above shall be due only upon full and complete performance of each benchmark task listed above for all equipment and services required pursuant to the specifications contained in this Invitation for Bids.

A 5 percent retention will be withheld by CITY from each of the payments listed above. Such 5 percent retention shall be provided to CITY's contractor for payment to Supplier at the time of final payment as required by the contract documents and prevailing California law.

The Invitation for Bids shall allow for a price escalation for the UV System equal to increases in the (Bureau of Labor Statistics (BLS) Producer Price Index) if the City's contractor fails to order the equipment within ninety (90) days from award of the construction contract for the Project and contractor shall be solely responsible for such costs.

ARTICLE 5 - TERMS AND CONDITIONS

1. CITY's contractor will review accelerometer on the delivery truck, and visually inspect shipment(s) from Supplier upon receipt at construction site to determine whether they conform to the requirements of this MOU. Notwithstanding these provisions for inspection, Supplier acknowledges that the UV System is not reasonably subject to mere visual inspections to ascertain whether the equipment fully conforms to the applicable specifications and that testing after installation is required prior to final acceptance of the equipment. CITY's contractor shall be required to schedule performance testing per the Technical Specifications with the assistance of the Supplier.
2. Operations Manual and Training: Supplier shall be responsible to provide an operations and maintenance manual and training to the CITY's employees as set forth in the Technical Specifications. All costs associated with provision of the operations and maintenance manual and employee training is included in the price set forth above.

3. Price Escalation: The costs included in this MOU shall remain in effect and are not subject to escalation for twenty-two (22) months from the date of approval of the MOU by the CITY's Board of Public Utilities, provided that once the CITY awards a construction contract for the Project, the price of the UV System will be subject to the price escalator pursuant in the construction contract as addressed in Article 4 above. The CITY may seek to extend this MOU subject to appropriate Board of Public Utilities approval, if there is a delay in the bidding and/or award of the construction project.
4. Delivery of the System: Supplier shall have the equipment ready to ship at the time agreed upon with the successful bidder and delivery of the UV System shall be coordinated between Supplier and the City's contractor so as to avoid storage and re-shipping of the UV System.
5. Warranty: Supplier expressly warrants that all equipment shall conform to all Technical Specifications and final design. All equipment shall be new and of good merchantable quality, free from material defects of workmanship and fit for the purpose for which it is specified. For purposes of this warranty, any parts not meeting the foregoing quality shall be deemed defective. Supplier provides warranties on all equipment provided as set forth in the Technical Specifications. The foregoing warranty provisions shall also be applicable to equipment or software supplied to Supplier by a third party entity and provided to CITY's contractor via this MOU. Any warranties provided by third party equipment or software supplier shall be assigned to the CITY after final acceptance as defined in the Technical Specifications.
6. Liens, Claims And Encumbrances: Supplier warrants and represents that all the equipment when delivered will be free and clear of all liens, claims, encumbrances and infringements of any patents, trademarks, copyrights or franchise rights.
7. Independent Contractor: Supplier, and Supplier's employees or persons under contract to Supplier in the performance of services on this MOU, including services provided on CITY property, shall perform work as independent contractors. Supplier shall provide insurance to cover its work and its employees as required by the CITY's contractor. Further, neither party to this MOU is the agent or legal representative of the other party for any purpose, nor shall the actions of either party under this MOU create a partnership, joint venture, or relationship of principal and agent between the parties.
8. Indemnification: Supplier agrees to indemnify, protect, hold harmless and defend CITY and their officers, agents, employees, volunteers, and boards, from any and all claims or liabilities arising from any liability imposed for injury, as defined by California Government Code Section 810.8, whether arising before or after completion of the work hereunder, or in any manner, directly or indirectly caused, claimed occasioned or contributed to, by reason of any negligent act or omission of Supplier, excepting for claims or liabilities arising from active negligence of CITY. Supplier shall also indemnify, protect, hold harmless and defend CITY and CITY's contractor for claims or liabilities arising by reason of claimed infringements of any patents, trademarks, copyrights or franchise rights, in connection with or incident to or arising out of the performance of this contract, unless the alleged infringement occurs as a result of any alteration or modification to the product or the use of the product in combination with the products or services of any party other than Supplier.
9. Assignment: Supplier shall not assign any of its responsibilities under this MOU, and no such assignment will be binding upon CITY or CITY's contractor unless such assignment has had prior written approval of CITY, which approval shall be solely within the discretion of CITY. Failure to obtain approval of any assignment, including an involuntary assignment to creditors, shall constitute a breach of this MOU which may lead to termination.
10. Jurisdiction: This MOU shall be administered and interpreted under the laws of the State of California, including but not limited to the Uniform Commercial Code, without regard to the conflict of laws provisions thereof. The United Nations Convention on the International Sale of Products will not apply. The jurisdiction for any litigation arising from this MOU shall be in the state of California, and its venue shall be in the County of Sonoma.

11. Modifications: No modification to this MOU, nor any waiver of any rights, shall be effective unless agreed to in writing by both Parties.
12. Liquidated Damages: The CITY's contractor may include liquidated damage penalties in its purchase agreement with Supplier to the extent that same are required of the City's contractor. Such damages should only be applicable if directly related to Supplier's failure to deliver the equipment within the time period stipulated in this MOU (30 weeks from notice for purchase from the City's contractor), failure to support the startup of the equipment, or failure of the equipment during the startup where any such failures result in a delay to the critical path of the construction project schedule. The amount of such damages in the aggregate shall not exceed ten (10) percent of the total equipment contract price as listed in this MOU.
13. Counterparts and Electronic Signatures. This Amendment and future documents relating thereto may be executed in two or more counterparts, each of which will be deemed an original and all of which together constitute one Agreement. Counterparts and/or signatures delivered by facsimile, pdf or City-approved electronic means have the same force and effect as the use of a manual signature. Both City and Consultant wish to permit this Amendment and future documents relating thereto to be electronically signed in accordance with applicable federal and California law. Either Party to this Agreement may revoke its permission to use electronic signatures at any time for future documents by providing notice pursuant to the Agreement. The Parties agree that electronic signatures, by their respective signatories are intended to authenticate such signatures and to give rise to a valid, enforceable, and fully effective Agreement. The City reserves the right to reject any digital signature that cannot be positively verified by the City as an authentic electronic signature."
14. Notices: All notices under this MOU shall be in writing and shall be considered delivered and effective on the earlier of actual receipt or (i) the day following transmission if sent by facsimile when followed by written confirmation by overnight carrier or certified United States mail; or (ii) one (1) day after dispatch if sent by private overnight carrier (e.g., Federal Express); or (iii) five (5) days after posting if sent by certified mail. Notice shall be sent to the following persons:

Supplier:

Contact Name: Christopher Todd
Address: 3000 GSK Dr., Moon Township, PA 15108
Phone: 724-218-7244
E-mail: christopher.todd@kuraray.com

City of Santa Rosa:

Contact: City Project Manager
Name: Mark Kasraie, Supervising Engineer
Address: 69 Stony Circle, Santa Rosa, CA 95401
Phone: 707-543-3857
E-mail: mkasraie@srcity.org

Name: Molly Maclean, Assistant City Attorney
Address: 100 Santa Rosa Avenue, RM8, Santa Rosa CA, 95404
Phone: 707-543-3040
E-mail: mmaclean@srcity.org

Construction Manager:

Contact Name: TBD
Address: TBD
Phone: TBD
E-mail: TBD

