

City of Garden Grove

INTER-DEPARTMENT MEMORANDUM

To:	Matthew J. Fertal	From:	William E. Murray
Dept:	City Manager	Dept:	Public Works
Subject:	APPROVAL OF A COOPERATIVE AGREEMENT WITH THE CITY OF WESTMINSTER FOR THE REHABILITATION OF BOLSA AVENUE FROM BUSHARD STREET TO BROOKHURST STREET IN GARDEN GROVE		
		Date:	December 10, 2013

OBJECTIVE

For City Council to approve the Cooperative Agreement between the City of Westminster and the City of Garden Grove for the rehabilitation of Bolsa Avenue from Bushard Street to Brookhurst Street in Garden Grove.

BACKGROUND/DISCUSSION

The City of Westminster has been awarded a grant through Prop 42 and Measure M2 for the rehabilitation of Bolsa Avenue from Bushard Street to Brookhurst Street. Approximately one-tenth of the work lies within the city of Garden Grove. The City of Westminster has offered to improve Garden Grove's portion.

This agreement will be for construction costs and construction administration of Garden Grove's portion of the project. The City of Westminster is serving as lead agency.

Staff has reviewed the plans and specifications of the project, including the location of Garden Grove's portion. The total project cost for Bolsa Avenue is estimated at \$76,567.26.

FINANCIAL IMPACT

There will be no impact to the General Fund. Funding required for the project was approved in the Fiscal Year 13/14 Budget in Fund 422.

COOPERATIVE AGREEMENT WITH THE CITY OF WESTMINSTER FOR THE
REHABILITATION OF BOLSA AVENUE FROM BUSHARD STREET TO BROOKHURST
STREET

December 10, 2013

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RECOMMENDATION

It is recommended that the City Council:

- Approve the Cooperative Agreement with the City of Westminster for the rehabilitation of Bolsa Avenue from Bushard Street to Brookhurst Street in Garden Grove and;
- Authorize the City Manager to execute the agreement and make minor modifications as appropriate thereto, on behalf of the City.



WILLIAM E. MURRAY, P.E.
Public Works Director



By: Kamyar Dibaj, EIT
Associate Engineer

Attachment: Cooperative Agreement

Recommended for Approval



Matthew Fertal
City Manager

AGREEMENT

THIS AGREEMENT ("Agreement"), dated this _____ day of _____, 2013, is made and entered into by and between the City of Westminster, a municipal corporation, hereinafter referred to as "**WESTMINSTER**" and the City of Garden Grove, a municipal corporation, hereinafter referred to as "**GARDEN GROVE**".

WITNESSETH:

WHEREAS, **WESTMINSTER** is contemplating the rehabilitation of the pavement surface of that portion of Bolsa Avenue from Bushard Street to Brookhurst Street, located in the City of Westminster, (hereinafter the "**WESTMINSTER PORTION**"); and,

WHEREAS, there is a portion of Bolsa Avenue located within the boundaries of **GARDEN GROVE** (hereinafter "**GG PORTION**"); and,

WHEREAS, **GARDEN GROVE** desires to have **WESTMINSTER** rehabilitate the **GG PORTION** of Bolsa Avenue in conjunction with the **WESTMINSTER PORTION**, collectively the "**PROJECT**", and **WESTMINSTER** is willing to do so. The exact location of the **GG PORTION** is described in detail in the document attached hereto as Exhibit A, incorporated herein by this reference. The estimated cost of the **GG PORTION**, including a ten percent (10%) contingency, is Seventy-Six Thousand and Five Hundred and Sixty-Seven Dollars and Twenty-Six Cents (\$76,567.26) (the "Estimated Cost").

NOW, THEREFORE, in consideration of the following promises, covenants, and conditions, the parties hereto do agree as follows:

1. **DUTIES OF WESTMINSTER**

- a. Upon commencement of the **PROJECT**, **WESTMINSTER** shall include the **GG PORTION** as a part of **WESTMINSTER's** public works project, prepare the request for bids, hire the lowest responsible bidder (the "Successful Contractor"), and oversee and administer the **PROJECT** in the **GG PORTION** in the same manner and to the same extent as the **WESTMINSTER PORTION**, all in accordance with all applicable laws governing construction of public works by **WESTMINSTER**, including, but not limited to, the California Environmental Quality Act and laws governing public bidding and the payment of prevailing wages. If **WESTMINSTER**, in its sole discretion, determines not to proceed with the **PROJECT** at any time prior to commencement of actual work, this Agreement shall terminate with no further action required by either party. In the event the projected actual cost of the **GG PORTION**, as reflected in the Successful Contractor's bid, exceeds the Estimated Cost by twenty percent (20%), **WESTMINSTER** shall not award a contract to the Successful Bidder for the **GG PORTION** without prior written approval of **GARDEN GROVE**.

- b. At least thirty (30) calendar days prior to release of the Notice Inviting Bids for the **PROJECT**, **WESTMINSTER's** City Engineer shall provide **GARDEN GROVE's** City Engineer a copy of the **PROJECT's** plans and specifications for his approval, which approval shall not be unreasonably withheld. If **GARDEN GROVE's** City Engineer objects to the plans and specifications, and if his objections cannot be satisfied through discussions with **WESTMINSTER's** City Engineer, the **GG PORTION** shall not be included in the **PROJECT** and **WESTMINSTER** shall proceed with the **WESTMINSTER PORTION** only.
- c. **WESTMINSTER** agrees that it shall not permit nor cause any hazardous materials to be brought upon, kept, used, stored, generated or disposed of in, on, or about the **GG PORTION**. "Hazardous Materials" shall mean any material that, because of its quantity, concentration, or physical or chemical characteristics, or any combination thereof, is deemed by a federal, state, or local governmental authority to pose a present or potential hazard to human health or safety or to the environment.
- d. **WESTMINSTER** shall ensure that its contract with the Successful Contractor requires the Successful Contractor provide insurance acceptable to **GARDEN GROVE** as shown in Exhibit "B," to name **GARDEN GROVE** as an additional insured, and to indemnify, defend, and hold harmless **GARDEN GROVE** in the same manner and to the same extent as **WESTMINSTER**. **WESTMINSTER** shall not permit construction of any portion of the **PROJECT** to commence until evidence of the required insurance and additional insured endorsements have been provided to and approved by **GARDEN GROVE**.

2. **GARDEN GROVE'S DUTIES**

- a. **GARDEN GROVE** shall pay **WESTMINSTER** for the actual cost of the work on the **GG PORTION** based upon unit prices bid of the Successful Contractor and quantities actually used on the **GG PORTION**. **GARDEN GROVE** shall pay **WESTMINSTER** the total amount due for the **GG PORTION** upon official final approval of the work by **GARDEN GROVE** provided that such final approval shall not be unreasonably withheld.
- b. **GARDEN GROVE** agrees that any permits required by the Successful Contractor for the work to be performed on the **GG PORTION** shall be issued to the Successful Contractor at no cost to **WESTMINSTER** or the Successful Contractor.
- c. **GARDEN GROVE** shall provide its own inspection services for the **GG PORTION** of the work.

- d. **GARDEN GROVE** agrees to fully cooperate with **WESTMINSTER** and the Successful Contractor in the prosecution of the work, traffic control, and any other matters required for completion of the **PROJECT** in the **GG PORTION**.
- e. **GARDEN GROVE** acknowledges that **WESTMINSTER** is not the contractor for the **PROJECT** and that **WESTMINSTER** does not warrant any work performed by the Successful Contractor. Notwithstanding the above, **WESTMINSTER** shall require the Successful Contractor to provide **GARDEN GROVE** with any and all warranties, insurance coverage, and indemnities and any other rights the Successful Contractor agrees to provide to **WESTMINSTER** under the construction contract and as provided by law.
- f. In addition to the above, **GARDEN GROVE** also agrees to pay **WESTMINSTER** for all costs associated with any change orders pertaining to the **GG PORTION**, provided the change orders have been previously approved in writing by **GARDEN GROVE's** City Engineer.

3. **ENTIRE AGREEMENT**

This writing constitutes the entire agreement between the parties with respect to the subject matter hereof, and supersedes all oral or written representations or written agreements that may have been entered into between the parties. No modifications or revisions shall be of any force or effect, unless the same is in writing and executed by the parties hereto.

4. **ORDER OF PRECEDENCE**

In the event of an inconsistency in this Agreement and any of the attached Exhibit, the terms set forth in this Agreement shall prevail. If, and to the extent this Agreement incorporates by reference any provision of any document, such provision shall be deemed a part of this Agreement. Nevertheless, if there is any conflict among the terms and conditions of this Agreement and those of any such provision or provisions so incorporated by reference, this Agreement shall govern over the document referenced.

5. **ASSIGNMENT**

Neither **GARDEN GROVE** nor **WESTMINSTER** may assign or transfer its rights or obligations under this Agreement, or any part thereof, without the written consent of the other party.

6. **ATTORNEYS' FEES**

In the event that litigation is brought by any party in connection with this Agreement, the prevailing party shall be entitled to recover from the opposing party all costs and expenses, including reasonable attorneys' fees, incurred by the prevailing party in the exercise of any of its rights or remedies hereunder or the enforcement of any of the terms, conditions, or provisions hereof.

7. **GOVERNING LAW**

This Agreement shall be governed by the laws of the State of California. If any portion of this Agreement is held invalid under any applicable statute or rule of law, then such portion only shall be deemed invalid. Venue shall exclusively be in a court of competent jurisdiction in the County of Orange, California.

8. **NO WAIVER**

No waiver or failure to exercise any right, option, or privilege under the terms of this Agreement on any occasion shall be construed to be a waiver of any other right, option, or privilege on any other occasion.

9. **NO THIRD PARTY RIGHTS**

The parties do not intend to create rights in, or to grant remedies to, any third party as a beneficiary of this Agreement or of any duty, covenant, obligation, or undertaking established herein.

10. **NOTICES**

Notices and communication concerning this Agreement shall be sent to the following addresses:

WESTMINSTER

City of Westminster
Attention: Public Works Director
8200 Westminster Blvd.
Westminster, CA 92683

GARDEN GROVE

City of Garden Grove
Attention: Public Works Director
11222 Acacia Parkway
Garden Grove, CA 92842

Either party may, by notice to the other party, change the address specified above. Any notices, documents, correspondence or other communications concerning this Agreement may be provided by personal delivery, facsimile or mail and shall be addressed as set forth above. Such communication shall be deemed served or delivered: a) at the time of delivery if such communication is sent by personal delivery; b) at the time of transmission if such communication is sent by facsimile; and c) five (5) calendar days after deposit in the U.S. Mail as reflected by the official U.S. postmark if such communication is sent through regular United States mail.

11. EFFECTIVE DATE

The effective date of this Agreement shall be the latest date of execution hereinafter set forth opposite the names of the signatures hereto.

12. INDEMNITY

WESTMINSTER and **GARDEN GROVE** each hereby agrees to indemnify, defend, protect and hold harmless the other party, and its elected and appointed officials, officers, employees, representatives, volunteers, and agents from and against any and all claims (including, without limitation, claims for bodily injury, death or damage to property), demands, workers' compensation benefits, obligations, damages, actions, causes of action, suits, losses, judgments, fines, penalties, liabilities, costs and expenses of any kind or nature, arising from the activities of the indemnitor or its officers, agents, or employees on the **PROJECT**, or any breach of contract, negligent acts, omissions or breach of law, or willful misconduct of the indemnitor, or its officers, agents, or employees arising out of the performance of, or failure to perform, any provisions of this Agreement. Neither party assumes liability for the acts or omissions of persons other than each party's respective officers, agents, or employees. In the event judgment is entered against both parties because of joint or concurrent negligence of both parties, or their officers, agents, or employees, an apportionment of liability to pay such judgment shall be made by a court of competent jurisdiction. The respective obligations of the parties pursuant to this Section shall survive expiration or earlier termination of this Agreement.

13. COOPERATION

In the event any claim or action is brought against **WESTMINSTER** relating to the performance rendered under this Agreement, **GARDEN GROVE** shall render any reasonable assistance and cooperation which **WESTMINSTER** might require.

14. COSTS

Each party shall bear its own costs and fees incurred in the preparation and negotiation of this Agreement and in the performance of its obligations hereunder except as expressly provided herein.

15. HEADINGS

Paragraphs and subparagraph headings contained in this Agreement are included solely for convenience and are not intended to modify, explain or to be a full or accurate description of the content thereof and shall not in any way affect the meaning or interpretation of this Agreement.

16. CONSTRUCTION.

The parties have participated jointly in the negotiation and drafting of this Agreement. In the event an ambiguity or question of intent or interpretation arises with respect to this Agreement, this Agreement shall be construed as if drafted jointly by the

parties and in accordance with its fair meaning. There shall be no presumption or burden of proof favoring or disfavoring any party by virtue of the authorship of any of the provisions of this Agreement.

17. **SEVERABILITY**

If any provision of this Agreement is determined by a court of competent jurisdiction to be unenforceable in any circumstance, such determination shall not affect the validity or enforceability of the remaining terms and provisions hereof or of the offending provision in any other circumstance. Notwithstanding the foregoing, if the value of this Agreement, based upon the substantial benefit of the bargain for any party, is materially impaired, which determination made by the presiding court or arbitrator of competent jurisdiction shall be binding, then both parties agree to substitute such provision(s) through good faith negotiations.

18. **COUNTERPARTS**

This Agreement may be executed in one or more counterparts, each of which shall be deemed an original and all of which shall constitute but one and the same instrument.

19. **CORPORATE AUTHORITY**

The persons executing this Agreement on behalf of the parties hereto warrant that they are duly authorized to execute this Agreement on behalf of said parties and that by doing so the parties hereto are formally bound to the provisions of this Agreement.

[Signatures on the following page.]

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed on the dates hereinafter respectively set forth.

CITY OF WESTMINSTER,
a municipal corporation

ATTEST:

By: _____
Eddie Manfro, City Manager

Robin Roberts, Westminster City Clerk

APPROVED AS TO FORM:

DATE OF EXECUTION:

Richard D. Jones, Westminster City Attorney

CITY OF GARDEN GROVE,
a municipal corporation

ATTEST:

By: _____
Matthew J. Fertil, City Manager

Kathleen Bailor, Garden Grove City Clerk

APPROVED AS TO FORM:

DATE OF EXECUTION:



Thomas F. Nixon, Garden Grove City Attorney

EXHIBIT "B"
CITY OF WESTMINSTER
CITY OF GARDEN GROVE
INSURANCE REQUIREMENTS FOR CONTRACTORS

Contractor shall procure and maintain for the duration of the contract and thereafter (unless specified below) all insurance that would be kept by a reasonable contractor under similar circumstances against all claims that may arise from or in connection with the performance of the work hereunder by the Contractor, its agents, representatives, volunteers, employees, or subcontractors (the "WORK"). The cost of such insurance shall be borne by the Contractor and/or included in the Contractor's proposal.

A. MINIMUM SCOPE OF INSURANCE

Coverage shall be at least as broad as:

1. Insurance Services Office ("ISO") Form #CG 00 01 11 88 Commercial General Liability coverage.
2. ISO Form # CA 00 01 01 87 Business Auto liability coverage, symbol 1 "any auto".
3. Workers' Compensation insurance as required by the State of California and Employers Liability insurance.

B. MINIMUM LIMITS OF INSURANCE

Contractor shall maintain limits no less than:

1. **General Liability:** \$1,000,000 per occurrence for bodily injury, personal injury and property damage, with a \$2,000,000 general aggregate limit. The general aggregate limit shall apply separately to this project/location. This insurance shall be maintained during the term of this contract and for at least ten consecutive years following the completion of the WORK.
2. **Automobile Liability:** \$1,000,000 combined single limit per accident for bodily injury and property damage, with a \$2,000,000 general aggregate limit. Such insurance shall include coverage for all owned, hired and non-owned automobiles. This insurance shall be maintained during the term of this contract and for at least three consecutive years following the completion of the WORK. This insurance shall be endorsed to be applicable solely to claims based upon, arising out of or related to the WORK.
3. **Workers' Compensation and Employers Liability:** Workers' compensation insurance in compliance with all applicable state and federal law, including the Labor Code of the State of California, with limits not less than the amount prescribed by law, and Employer's Liability Insurance with limits of not less than \$1,000,000 per occurrence.

C. DEDUCTIBLES AND SELF-INSURED RETENTION

Any deductibles or self-insured retentions applicable to insurance policies required herein must be declared to and approved by City of Westminster and City of Garden Grove prior to Contractor obtaining such insurance policy. In no event shall any insurance policy required in this contract have a deductible, self-insured retention or other similar provision (including any "fronting" component) in excess of \$50,000 without prior written approval of the City of Westminster and City of Garden Grove in their sole discretion. At the option of the City of Westminster and City of Garden Grove, either, the insurer shall reduce or eliminate such deductibles or self-insured retention as respects City of Westminster, City of Garden Grove, their officers, elected or appointed officials, employees, and volunteers; or the Contractor shall procure a bond guaranteeing payment of any losses, damages, expenses, costs or settlements up to the amount of such deductibles or self-insured retentions.

D. OTHER INSURANCE PROVISIONS

The policies are to contain, or be endorsed to contain, the following provisions:

1. **General Liability, Automobile Liability and Umbrella/Excess Liability Coverages**
 - a. The City of Westminster, the City of Garden Grove, their officers, elected or

appointed officials, employees, agents, and volunteers are to be covered as an additional insured as respects defense and indemnity against claims seeking recovery for: liability arising out of activities performed by or on behalf of the Contractor; products and completed operations of the Contractor; premises owned, occupied or used by the Contractor; or automobiles owned, leased, hired, or borrowed by the Contractor. The coverage shall not extend to any indemnity coverage for the sole active negligence of the additional insured in any case where an agreement to indemnify the additional insured would be invalid under Civil Code § 2782(b), and shall contain no special limitations on the scope of protection afforded to the City of Westminster, the City of Garden Grove, their officers, elected or appointed officials, employees, agents, or volunteers.

- b. The Contractor's insurance coverage shall be primary insurance as respects the City of Westminster, the City of Garden Grove, their officers, elected or appointed officials, agents, employees, and volunteers. Any insurance or self-insurance maintained by the City of Westminster, the City of Garden Grove, their officers, elected or appointed officials, agents, employees, or volunteers shall be excess of the Contractor's insurance and shall not contribute with it.
- c. Except with respect to the limits of the insurers' liability, the Contractor's insurance shall apply separately to each insured against whom claim is made or suit is brought and shall provide that an act or omission of one of the insureds shall not reduce or void coverage to the other insureds. The Contractor's insurance shall not exclude coverage for suits or claims brought by or on behalf of one insured against any other insured.
- d. If a contract is executed between the City of Westminster and the Contractor, the policies shall be endorsed to include contractual liability.

2. **Workers' Compensation and Employers' Liability Coverage**

The insurer shall agree to waive all rights of subrogation against the City of Westminster, the City of Garden Grove, their officers, elected or appointed officials, agents, employees, and volunteers for losses arising from work performed by the Contractor for the City of Westminster.

3. **All Coverages**

- a. Each insurance policy shall be endorsed to state that coverage shall not be suspended, voided, canceled by either party, reduced in coverage or in limits except after thirty (30) day's prior written notice by certified mail, return receipt requested, has been given to the City of Westminster and the City of Garden Grove.
- b. Each insurance policy shall provide that the insurer waives any and all rights of subrogation against the City of Westminster, the City of Garden Grove, their officers, elected or appointed officials, agents, employees, and volunteers.
- c. If CONTRACTOR maintains higher limits than the minimums shown above, the City of Westminster and the City of Garden Grove shall be entitled to coverage for the higher limits maintained by the CONTRACTOR. Furthermore, CONTRACTOR shall not reduce such higher insurance limits to the minimum required herein.

E. **ACCEPTABILITY OF INSURERS**

Insurance is to be placed with insurers authorized to do business by the Insurance Commissioner in the State of California, with a rating by A.M. Best's of no less than A, Class VII. All insurers shall be licensed by or holding admitted status in the State of California.

F. **VERIFICATION OF COVERAGE**

Contractor shall furnish the City of Westminster and the City of Garden Grove with certificates of insurance and with original endorsements effecting coverage required by

this clause. The certificates and endorsements for each insurance policy are to be signed by a person authorized by that insurer to bind coverage on its behalf. The certificates and endorsements are to be on forms provided by the City of Westminster. Where by statute, the City of Westminster's workers' compensation-related forms cannot be used, equivalent forms approved by the Insurance Commissioner are to be substituted. All certificates and endorsements are to be received and approved by the City of Westminster and the City of Garden Grove before WORK commences, and shall evidence that all premiums have been paid for the entire forthcoming policy period. The City of Westminster reserves the right to require complete, certified copies of all required insurance policies, at any time. The delivery to the City of Westminster of any certificates of insurance or endorsements hereunder which do not comply with the requirements set forth in this contract shall not waive the City of Westminster's right to require such compliance.

G. FAILURE TO MAINTAIN INSURANCE

If Contractor fails to obtain and maintain the insurance required hereunder, the City of Westminster shall have the right, but not the obligation, to obtain the same or similar insurance in the name and account of Contractor in which event the Contractor shall pay the cost thereof and furnish upon demand all information that may be requested by the City of Westminster to permit the City of Westminster to obtain all such required coverage on behalf of the Contractor. The City of Westminster shall have the right to offset (without recourse by the Contractor) against any amounts owing to the Contractor, amounts the City of Westminster reasonably incurs in obtaining insurance required of Contractor herein.

H. NO LIMITATION ON INDEMNITY

The procuring of the insurance required in this contract or the delivery of policies or certificates evidencing the same shall not be construed as a limitation of Contractor's obligation to indemnify the City of Westminster, the City of Garden Grove, or any of their officers, elected or appointed officials, agents, volunteers or employees.

I. NO REPRESENTATION

Neither the City of Westminster, the City of Garden Grove, nor any of their officers, elected or appointed officials, agents, volunteers or employees make any representation that the types of insurance and the limits specified to be carried by Contractor under this contract are adequate to protect Contractor. If Contractor believes that any such insurance coverage is insufficient, Contractor shall provide, at its own expense, such additional insurance as Contractor deems adequate.

J. SUBCONTRACTORS

All subcontractors shall comply with all of the requirements stated in this contract. Contractor shall furnish the City of Westminster and the City of Garden Grove with separate certificates and endorsements for each subcontractor.