

FORMAL CONTRACT

SECTION 500

CONTRACT No. C09128718
(Public Work)
Department of Public Works

This Contract, number **C09128718** dated _____ is entered into by and between the City of Palo Alto, a charter city and a municipal corporation of the State of California ("City"), and **JMB Construction, Inc.** ("Contractor").

For and in consideration of the covenants, terms, and conditions (*the provisions*) of this Contract, City and Contractor ("the parties") agree:

1. **Term.** This Contract shall commence and be binding on the parties on the Date of Execution of this Contract, and shall expire on the date of recordation of the Notice of Substantial Completion, or, if no such notice is required to be filed, on the date that final payment is made hereunder, subject to the earlier termination of this Contract.
2. **General Scope of Project and Work.** Contractor shall furnish labor, services, materials and equipment in connection with the construction of the Project and complete the Work in accordance with the covenants, terms and conditions of this Contract to the satisfaction of City. The Project and Work is generally described as follows:

 Title of Project: **Recycled Water Contact Chamber Retrofit, Invitation for Bids (IFB) No. 128718**

 Bid: **\$878,800.00 (Eight hundred seventy-eight thousand eight hundred dollars)**
3. **Contract Documents.** This Contract shall consist of the documents set forth below, which are on file with the City Clerk and are hereby incorporated by reference. For the purposes of construing, interpreting and resolving inconsistencies between and among the provisions of this Contract, these documents and the provisions thereof are set forth in the following descending order of precedence.
 - a. This Contract.
 - b. Invitation for Bid.
 - c. Project Specifications.
 - d. Drawings.
 - e. Change Orders.
 - f. Bid.
 - g. Supplementary Conditions.
 - h. General Conditions.
 - i. City of Palo Alto Dept. of Public Works Standard Drawings and Specifications (most current version).
 - j. Certificate of Insurance, Performance Surety Bond, Labor & Materials (Payment) Surety Bond.
 - k. Other Specifications, or part thereof, not expressly incorporated in the Contract Specifications or the City of Palo Alto Dept. of Public Works Standard Drawings and Specifications (most current version).
 - l. Any other document not expressly mentioned herein which is issued by City or entered into by the parties.
4. **Compensation.** In consideration of Contractor's performance of its obligations hereunder, City shall pay to Contractor the amount set forth in Contractor's Bid in accordance with the provisions of this Contract and upon the receipt of written invoices and all necessary supporting documentation within the time set forth in the Contract Specifications and the City of Palo Alto Dept. of Public Works Standard Drawings and Specifications (most current version), or, if no time is stated, within thirty (30) Days of the date of receipt of Contractor's invoices.
5. **Insurance.** On or before the Date of Execution, Contractor shall obtain and maintain the policies of insurance coverage described in the Invitation For Bid on terms and conditions and in amounts as may be required by the Risk Manager. City shall not be obligated to take out insurance on Contractor's personal property or the personal property of any person performing labor or services or supplying materials or equipment under the Project. Contractor shall furnish City with the certificates of insurance and with original endorsements affecting coverage required under this Contract on or before the Date of Execution. The certificates and endorsements for each insurance policy shall be signed by a person who is authorized by that insurer to bind coverage in its

behalf. Proof of insurance shall be mailed to the Project Manager to the address set forth in Section 16 of this Contract.

6. Indemnification. Contractor agrees to protect, defend, indemnify and hold City, its Council members, officers, employees, agents and representatives harmless from and against any and all claims, demands, liabilities, losses, damages, costs, expenses, liens, penalties, suits, or judgments, arising, in whole or in part, directly or indirectly, at any time from any injury to or death of persons or damage to property as a result of the willful acts or the negligent acts or omissions of Contractor, or which results from Contractor's noncompliance with any Law respecting the condition, use, occupation or safety of the Project site, or any part thereof, or which arises from Contractor's failure to do anything required under this Contract or for doing anything which Contractor is required not to do under this Contract, or which arises from conduct for which any Law may impose strict liability on Contractor in the performance of or failure to perform the provisions of this Contract, except as may arise from the sole willful acts or negligent acts or omissions of City or any of its Council members, officers, employees, agents or representatives. This indemnification shall extend to any and all claims, demands, or liens made or filed by reason of any work performed by Contractor under this Contract at any time during the term of this Contract, or arising thereafter.

To the extent Contractor will use hazardous materials in connection with the execution of its obligations under this Contract, Contractor further expressly agrees to protect, indemnify, hold harmless and defend City, its City Council members, officers and employees from and against any and all claims, demands, liabilities, losses, damages, costs, expenses, liens, penalties, suits, or judgments City may incur, arising, in whole or in part, in connection with or as a result of Contractor's willful acts or negligent acts or omissions under this Contract, under the Comprehensive Environmental Response, Compensation and Liability Act (42 U.S.C. §§9601-6975, as amended); the Resource Conservation and Recovery Act (42 U.S.C. §§6901-6992k, as amended); the Toxic Substances Control Act (15 U.S.C. §§2601-2692, as amended); the Carpenter-Presley-Tanner Hazardous Substance Account Act (Health & Safety Code, §§25300-25395, as amended); the Hazardous Waste Control Law (Health & Safety Code, §§25100-25250.25, as amended); the Safe Drinking Water and Toxic Enforcement Act (Health & Safety Code, §§25249.5-25249.13, as amended); the Underground Storage of Hazardous Substances Act (Health & Safety Code, §§25280-25299.7, as amended); or under any other local, state or federal law, statute or ordinance, or at common law.

7. Assumption of Risk. Contractor agrees to voluntarily assume any and all risk of loss, damage, or injury to the property of Contractor which may occur in, on, or about the Project site at any time and in any manner, excepting such loss, injury, or damage as may be caused by the sole willful act or negligent act or omission of City or any of its Council members, officers, employees, agents or representatives.
8. Waiver. The acceptance of any payment or performance, or any part thereof, shall not operate as a waiver by City of its rights under this Contract. A waiver by City of any breach of any part or provision of this Contract by Contractor shall not operate as a waiver or continuing waiver of any subsequent breach of the same or any other provision, nor shall any custom or practice which may arise between the parties in the administration of any part or provision of this Contract be construed to waive or to lessen the right of City to insist upon the performance of Contractor in strict compliance with the covenants, terms and conditions of this Contract.
9. No Exoneration By Inspection: The City has the right, but not the duty, to inspect Contractor's Work. The right of inspection is solely for the benefit of City. Contractor has the obligation to complete the Work in a satisfactory manner in compliance with Contract requirements. The presence of a City inspector does not shift that obligation to the City or relieve Contractor from its obligations to complete the Work in a satisfactory manner in compliance with the Contract requirements.
10. Compliance with Laws. Contractor shall comply with all Laws now in force or which may hereafter be in force pertaining to the Project and Work and this Contract, with the requirement of any bid security or fire underwriters or other similar body now or hereafter constituted, with any discretionary license or permit issued pursuant to any Law of any public agency or official as well as with any provision of all recorded documents affecting the Project site, insofar as any are required by reason of the use or occupancy of the Project site, and with all Laws pertaining to nondiscrimination in employment and hazardous materials.
11. Bid Security Bonds. As a condition precedent to City's obligation to pay compensation to Contractor, and on or before the Date of Execution, Contractor shall furnish to the Project Manager the Bid Security as required under the Invitation For Bid.

12. Representations and Warranties. In the supply of any materials and equipment and the rendering of labor and services during the course and scope of the Project and Work, Contractor represents and warrants:
- a. Any materials and equipment which shall be used during the course and scope of the Project and Work shall be vested in Contractor;
 - b. Any materials and equipment which shall be used during the course and scope of the Project and Work shall be merchantable and fit to be used for the particular purpose for which the materials are required;
 - c. Any labor and services rendered and materials and equipment used or employed during the course and scope of the Project and Work shall be free of defects in workmanship for a period of one (1) year after the recordation of the Notice of Substantial Completion, or, if no such notice is required to be filed, on the date that final payment is made hereunder;
 - d. Any manufacturer's warranty obtained by Contractor shall be obtained or shall be deemed obtained by Contractor for and in behalf of City.
 - e. Any information submitted by Contractor prior to the award of Contract, or thereafter, upon request, whether or not submitted under a continuing obligation by the terms of the Contract to do so, is true and correct at the time such information is submitted or made available to the City;
 - f. Contractor has not colluded, conspired, or agreed, directly or indirectly, with any person in regard to the terms and conditions of Contractor's Bid, except as may be permitted by the Invitation For Bid;
 - g. Contractor has the power and authority to enter into this Contract with City, that the individual executing this Contract is duly authorized to do so by appropriate resolution, and that this Contract shall be executed, delivered and performed pursuant to the power and authority conferred upon the person or persons authorized to bind Contractor;
 - h. Contractor has not made an attempt to exert undue influence with the Purchasing Manager or Project Manager or any other person who has directly contributed to City's decision to award the contract to Contractor;
 - i. There are no unresolved claims or disputes between Contractor and City which would materially affect Contractor's ability to perform under the Contract;
 - j. Contractor has furnished and will furnish true and accurate statements, records, reports, resolutions, certifications, and other written information as may be requested of Contractor by City from time to time during the term of this Contract;
 - k. Contractor and any person performing labor and services under this Project are duly licensed by the State of California as required by California Business & Professions Code Section 7028, as amended; and
 - l. Contractor has fully examined and inspected the Project site and has full knowledge of the physical conditions of the Project site.
13. Assignment. This Contract and the performance required hereunder is personal to Contractor, and it shall not be assigned by Contractor. Any attempted assignment shall be null and void.
14. Claims of Contractor. All claims pertaining to extra work, additional charges, or delays within the Contract Time or other disputes arising out of the Contract shall be submitted by Contractor to City in writing by certified or registered mail within ten (10) Days after the claim arose or within such other time as may be permitted or required by law, and shall be described in sufficient detail to give adequate notice of the substance of the claim to City.
15. Audits by City. During the term of this Contract and for a period of not less than three (3) years after the

- perform its obligations under this Contract which directly results from an Act of God or an act of a superior governmental authority.
- f. Headings. The paragraph headings are not a part of this Contract and shall have no effect upon the construction or interpretation of any part of this Contract.
- g. Incorporation of Documents. All documents constituting the Contract documents described in Section 3 hereof and all documents which may, from time to time, be referred to in any duly executed amendment hereto are by such reference incorporated in this Contract and shall be deemed to be part of this Contract.
- h. Integration. This Contract and any amendments hereto between the parties constitute the entire agreement between the parties concerning the Project and Work, and there are no other prior oral or written agreements between the parties that are not incorporated in this Contract.
- i. Modification of Agreement. This Contract shall not be modified or be binding upon the parties, unless such modification is agreed to in writing and signed by the parties.
- j. Provision. Any agreement, covenant, condition, clause, qualification, restriction, reservation, term or other stipulation in the Contract shall define or otherwise control, establish, or limit the performance required or permitted or to be required of or permitted by either party. All provisions, whether covenants or conditions, shall be deemed to be both covenants and conditions.
- k. Resolution. Contractor shall submit with its Bid a copy of any corporate or partnership resolution or other writing, which authorizes any director, officer or other employee or partner to act for or in behalf of Contractor or which authorizes Contractor to enter into this Contract.
- l. Severability. If a court of competent jurisdiction finds or rules that any provision of this Contract is void or unenforceable, the provisions of this Contract not so affected shall remain in full force and effect.
- m. Status of Contractor. In the exercise of rights and obligations under this Contract, Contractor acts as an independent contractor and not as an agent or employee of City. Contractor shall not be entitled to any rights and benefits accorded or accruing to the City Council members, officers or employees of City, and Contractor expressly waives any and all claims to such rights and benefits.
- n. Successors and Assigns. The provisions of this Contract shall inure to the benefit of, and shall apply to and bind, the successors and assigns of the parties.
- o. Time of the Essence. Time is of the essence of this Contract and each of its provisions. In the calculation of time hereunder, the time in which an act is to be performed shall be computed by excluding the first Day and including the last. If the time in which an act is to be performed falls on a Saturday, Sunday, or any Day observed as a legal holiday by City, the time for performance shall be extended to the following Business Day.
- p. Alternative Dispute Resolution. The parties shall endeavor to resolve any disputes or claims arising out of or relating to this Contract by mediation, which, unless the parties agree otherwise, shall be conducted under the auspices of the Judicial Arbitration and Mediation Service (JAMS), San Jose, California. The intent of the parties is that the mediation shall proceed in advance of litigation; however, if any party should commence litigation before the conclusion of mediation, such litigation, including discovery, shall be stayed pending completion of mediation, and by executing this Contract the parties stipulate to mediation in accordance with Santa Clara County Superior Court Local Rule 1.15 or Rule 2-3(b) of the ADR Local Rules of the U.S. District Court for the Northern District of California, as such rules may be amended from time to time. The parties shall share the cost of the mediation, including the mediator's fee, equally. Any written agreement reached in mediation shall be enforceable pursuant to California Code of Civil Procedure § 664.6, as amended.
- q. Venue. Unless the parties mutually agree otherwise, mediation shall take place in San Jose, California. In the event that litigation is commenced by any party hereunder, the parties agree that such action shall be vested exclusively in the state courts of California in the County of Santa Clara or

in the United States District Court for the Northern District of California.

- r. Recovery of Costs. Each Party shall bear its own costs, including attorney's fees, through the completion of mediation. If the claim or dispute is not resolved through mediation, or if litigation is necessary to enforce a settlement reached at mediation pursuant to California Code of Civil Procedure § 664.6, as amended, then the prevailing party in any subsequent litigation may recover its reasonable costs, including attorney's fees, incurred subsequent to conclusion of the mediation.
- s. Flow-down. Contractor agrees to include provisions of this Contract relating to Alternative Dispute Resolution, Venue, and Recovery of Costs in any subcontracts or major material purchase agreements which it enters into in connection with this Contract, and to require its subcontractors to include those provisions in any sub-contracts or major material purchase agreements, such that any mediation or litigation of any claim or dispute asserted by a subcontractor or major material supplier will be consolidated with any related claim or dispute between the Contractor and the City. Should the Contractor fail to do so, such that the City is required to defend an action brought by a subcontractor or material supplier inconsistent with the Alternative Dispute and Venue provisions of this Contract, Contractor shall indemnify City for City's costs of defense, including reasonable attorney's fees.

IN WITNESS WHEREOF, the parties have by their duly appointed representatives executed this Contract in the city of Palo Alto, County of Santa Clara, State of California on the date first stated above.

APPROVED AS TO FORM:

CITY OF PALO ALTO

Senior Assistant City Attorney

City Manager

APPROVED:

CONTRACTOR:

Director of Administrative Services

By: _____

Name: _____

Director of Public Works

Title: _____

CERTIFICATE OF ACKNOWLEDGMENT

(Civil Code § 1189)

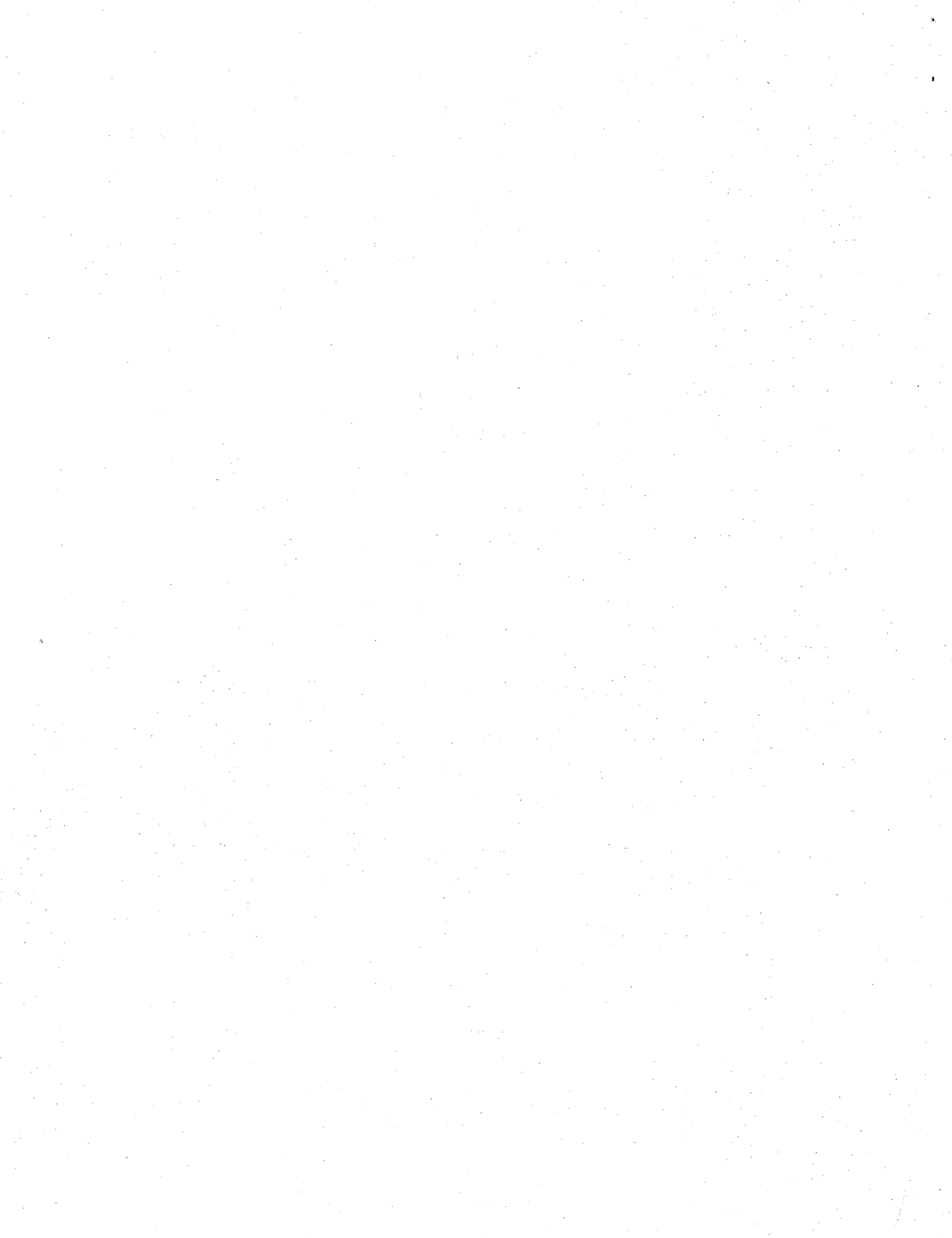
STATE OF _____)

COUNTY OF _____)

On _____, before me, _____ a notary public in and for said County, personally appeared _____, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

Signature _____ (Seal)



Attachment B

City of Palo Alto, Public Works Department - RWQCP

Bid Summary for Recycled Water Contact Chamber Retrofit (IFB 128718)

| Bid Item | Quantity | Description | Engineer's Estimate | Anderson Pacific | JMB Construction | Remarks |
|----------|----------|--|---------------------|------------------|------------------|---------|
| 1 | 1 LS | Demolition, piping and civil site work | \$405,000 | \$925,000 | \$493,800 | |
| 2 | 1 LS | Sheeting, shoring and bracing | \$13,000 | \$149,000 | \$10,000 | |
| 3 | 1 LS | Tank baffles and covers | \$304,000 | \$370,000 | \$300,000 | |
| 4 | 1 LS | Electrical, instrumentation and controls | \$31,000 | \$40,000 | \$75,000 | |
| | | Total | \$753,000 | \$1,484,000 | \$878,800 | |

CERTIFICATION OF NONDISCRIMINATION

FORM 410

PROJECT: Recycled Water Contact Chamber Retrofit

Certification of Nondiscrimination: As suppliers of goods and/or services to the City of Palo Alto in excess of \$5,000, the firm, contractor or individual(s) listed below certify that: they do not and in the performance of this contract they will not discriminate in employment of any person because of race, skin color, gender, age, religion, disability, national origin, ancestry, sexual orientation, housing status, marital status, familial status, weight or height of such person; and further certify that they are in compliance with all Federal, State and local directives and executive orders regarding nondiscrimination in employment.

Firm: JMB Construction, Inc. DATE: 9-8-08

Title of Officer Signing: PRESIDENT

Signature: 