

## Mark Thomas & Company, Inc.

### FIFTH AMENDMENT TO AGREEMENT FOR SERVICES #157-S1411

**THIS FIFTH AMENDMENT** to that Agreement for Services #157-S1411 made and entered into by and between the County of El Dorado, a political subdivision of the State of California (hereinafter referred to as "County"), and Mark Thomas & Company, Inc., a corporation duly qualified to conduct business in the State of California, whose principal place of business is 2833 Junction Avenue, Suite 110, San Jose, California 95134, and whose local office address is 701 University Avenue, Suite 200, Sacramento, California 95825 (hereinafter referred to as "Consultant");

#### RECITALS

**WHEREAS**, Consultant has been engaged by County to provide design services during construction for its U.S. 50/Silva Valley Parkway Interchange - Phase 1 Project (Project), pursuant to Agreement for Services #157-S1411, dated October 29, 2013; First Amendment to Agreement for Services #157-S1411, dated April 19, 2016; Second Amendment to Agreement for Services #157-S1411, dated April 18, 2017, Third Amendment to Agreement for Services #157-S1411, dated December 17, 2019, and Fourth Amendment to Agreement for Services #157-S1411, dated December 8, 2020 incorporated herein and made by reference a part hereof (hereinafter referred to as "Agreement");

**WHEREAS**, the parties hereto desire to amend the Agreement to extend the expiration date of December 31, 2022 for one (1) additional year, amending **ARTICLE II, Term**;

**WHEREAS**, the parties hereto desire to amend the Agreement to update County's notice recipient address, amending **ARTICLE XVII, Notice to Parties**;

**WHEREAS**, the parties hereto desire to fully-replace or add specific Articles to update the Agreement to include County's current standard contract provisions;

**NOW, THEREFORE**, in consideration of the foregoing and the mutual promises and covenants hereinafter contained, County and Consultant mutually agree to amend the terms of the Agreement in this Fifth Amendment to Agreement for Services #157-S1411 on the following terms and conditions:

I. **ARTICLE II, Term**, of the Agreement is amended in its entirety to read as follows:

#### **ARTICLE II**

**Term:** This Agreement shall become effective when fully executed by the parties hereto and shall cover the period of October 29, 2013 through December 31, 2023, as amended.

II. **ARTICLE XVII, Notice to Parties**, of the Agreement is amended in its entirety to read as follows:

**ARTICLE XVII**

**Notice to Parties:** All notices to be given by the parties hereto shall be in writing and served by depositing same in the United States Post Office, postage prepaid and return receipt requested. Notices to County shall be in duplicate and addressed as follows:

To County:

With a copy to:

County of El Dorado  
Department of Transportation  
2441 Headington Road  
Placerville, California 95667

County of El Dorado  
Chief Administrative Office  
330 Fair Lane  
Placerville, California 95667

Attn.: John Kahling, P.E.  
Deputy Director, Engineering  
Headington Engineering Division

Attn.: Michele Weimer  
Procurement and Contracts  
Manager

or to such other location as County directs.

Notices to Consultant shall be addressed as follows:

Mark Thomas & Company, Inc.  
701 University Avenue, Suite 200  
Sacramento, California 95825

Attn.: Zach Siviglia  
Vice President

or to such other location as Consultant directs.

III. **The following articles are replaced in their entirety:**

**ARTICLE I**

**Scope of Services:**

Consultant's services to be provided specifically in support of County's U.S. 50/Silva Valley Parkway Interchange - Phase 1 project (hereinafter referred to as "Project").

Consultant is engaged in the business of doing the services and tasks required under this Agreement, including those services and tasks that are identified in Exhibit A, marked "Scope of Work," incorporated herein and made by reference a part hereof, and those services and tasks that are reasonably necessary for the completion of the work identified in the Scope of Work.

Consultant agrees to furnish, at Consultant's own cost and expense, all personnel, equipment, tools, materials, and services necessary to perform the services and tasks required under this Agreement, including those services and tasks that are identified in Exhibit A, and those services and tasks that are reasonably necessary for the completion of the work identified in the Scope of Work, or as identified in the individual Work Orders, to be issued in accordance with this Agreement. Deliverables for the specific items of work to be provided under the Scope of Work shall be as specified therein, shall be prepared using the software described in this Article, and shall be submitted in accordance with the timeframes specified in Exhibit A, hereto. Modifications to the deliverables required and completion times specified in Exhibit A, hereto or to the software requirements may only be made in accordance with the prior written approval of County's Contract Administrator.

Unless otherwise indicated, receipt of this executed Agreement is Consultant's Notice to Proceed with the work specified herein. No payment will be made for any work performed prior to the effective date of the Agreement.

In addition to the specific services identified in Exhibit A, hereto, this Agreement may also include Optional Tasks, as subsequently identified during the course of work under this Agreement by County's Contract Administrator, related to the Scope of Work as identified in Exhibit A. Such Optional Tasks may supplement or modify the Scope of Work as identified in Exhibit A, hereto or may include, but not be limited to, additional items of work that are deemed critical by County's Contract Administrator to the furtherance of completing the Project.

Before proceeding with any work concerning Optional Tasks under this Agreement, the parties will identify the specific services to be provided for each assignment in individual Work Orders to be issued in accordance with this Agreement.

The specific services for each Optional Tasks assignment shall be determined at a meeting or telephone conference between Consultant and County's Contract Administrator, or designee, to discuss the needs, applicable standards, required deliverables, specific Consultant staff, subconsultants, if applicable, and any necessary permits on a task-by-task basis. Within an agreed timeframe as determined by County's Contract Administrator, following the meeting or telephone conference, Consultant shall provide County's Contract Administrator with a written scope of work, a schedule including a list of tasks with completion dates, a target completion date for the overall scope of work, and a not-to-exceed cost itemization to complete the work (resulting in a Work Order), which shall require written approval, authorization, and written notification to proceed from County's Contract Administrator, prior to commencement of the work.

No payment will be made for any Optional Tasks performed prior to approval and full execution of the applicable Work Order, and no payment will be made for

amounts in excess of the not-to-exceed amount of the applicable Work Order.

Consultant shall provide County's Contract Administrator with the names and titles of Consultant's representatives that are authorized to bind Consultant by signing Work Orders and Work Order Amendments on Consultant's behalf. Consultant's notification of individuals authorized to execute Work Orders and Work Order Amendments on Consultant's behalf shall be communicated to County in accordance with the provisions of ARTICLE XVII, Notice to Parties, of this Agreement.

The period of performance for Work Orders issued for Optional Tasks, if any, shall be in accordance with dates specified in each Work Order. No payment will be made for any work performed before or after the period of performance in the Work Order, unless County's Contract Administrator and Consultant amend the Work Order. No Work Order will be written which exceeds the cumulative total of the not-to-exceed dollar amount of this Agreement.

County shall review Consultant's progress at key points as specified in each Work Order. Milestone reviews shall be performed for the specific products and deliverables listed in each Work Order. Milestones may only be changed by written agreement between County's Contract Administrator and Consultant's Project Manager.

Consultant shall submit all deliverables to County's Contract Administrator in accordance with completion time schedules identified in Exhibit A hereto or as specified in the individual Work Order. County's review of deliverables will ensure that Consultant's work meets a level of acceptability as determined by County's Contract Administrator, and Consultant shall be required to modify its work as necessary to meet that level of acceptability as defined by County's Contract Administrator. Failure to submit the required deliverables in the formats required may be grounds for termination of the Agreement, as provided in ARTICLE XVI, Default, Termination, and Cancellation, herein.

If a submittal or deliverable is required to be an electronic file, Consultant shall produce the file using Microsoft (MS) Office 365 applications (specifically, MS Word, MS Project and MS Excel). Signed reports shall be submitted in Adobe portable document format (PDF). Electronic AutoCAD 2010 or AutoCAD Civil 3D 2010 format shall be used for submittal of plans or other similar documents as specified by County's Contract Administrator. All digital photographs shall be submitted in jpeg format with a minimum resolution of 2816 X 2112. All deliverables shall be submitted in language, format and design that are compatible with and completely transferable to County's computer and engineering applications and that are acceptable to County's Contract Administrator. Newer versions of software may be used and other types of software used for analytical purposes may be authorized if approved in advance of the submittal by County's Contract Administrator.

All of the services included in Exhibit A hereto are the responsibility of Consultant, unless specifically described as a task or item of work to be provided by County. Consultant shall perform the services and tasks required under this Agreement in a safe, professional, skillful, and workmanlike manner. Consultant is responsible for ensuring that its employees, as well as any subcontractor if applicable, perform the services and tasks required under this Agreement accordingly. Consultant shall be responsible for the supervision, administration, and work performed by any subconsultant for services rendered under this agreement.

### **ARTICLE III**

#### **Compensation for Services:**

- A. For services provided herein, including all of the deliverables described in Exhibit A, Scope of Work, and in the individual Work Orders issued pursuant to this Agreement, County agrees to pay Consultant upon the satisfactory completion and County's acceptance of work, in arrears. Payment shall be made within forty-five (45) days following County's receipt and approval of itemized invoices identifying the services rendered.
- B. For the purposes hereof, for the period beginning with the effective date of this Agreement and continuing until the day before the effective date of this Fourth Amendment to the Agreement, the billing rates shall be in accordance with Exhibit B, marked "Fee Schedule," incorporated herein and made by reference a part hereof.

For the period beginning with the effective date of this Amendment and continuing through the remaining term of the Agreement, the billing rates shall be in accordance with Amended Exhibit B, marked "Amended Fee Schedule," incorporated herein and made by reference a part hereof.

Other direct costs including subconsultants' services and outside services authorized herein shall be invoiced at Consultant's cost, with a five percent (5%) markup, for the services rendered. Any invoices that include subconsultant services and other direct costs shall be accompanied by backup documentation to substantiate Consultant's costs for the services being billed on those invoices.

Neither mileage nor travel costs (i.e., overnight lodging, meals, parking, airfare, bridge tolls, and other per diem expenses) will be reimbursed as a direct cost for any services performed under this Agreement by Consultant or any authorized subconsultants.

- C. For services provided herein and described as Items of Work on Exhibit A, Scope of Work, the cost allocation and subconsultant assignment per Item of Work shall be in accordance with Exhibit C-1, marked "Updated Cost

Proposal\*," incorporated herein and made by reference a part hereof. In the performance of the scope of services to be provided in accordance with this budget, Consultant may request to reallocate the expenses listed herein among the various items of work, optional tasks, and subconsultants identified herein, subject to County's Contract Administrator's prior written approval. In no event shall the total not-to-exceed amount of the Agreement be exceeded. The Not-To-Exceed Amounts are inclusive of any markups for subconsultant services and direct costs associated with each item of work.

- D. The total amount for all Optional Tasks, if any, which may be assigned in accordance with this Agreement, shall not exceed \$25,000.00, inclusive of all Work Orders and amended Work Orders, all work of subconsultants, and all costs and expenses. The not-to-exceed amount of each individual Work Order so assigned shall not exceed the amount specified in each Work Order, unless County's Contract Administrator and Consultant amend the Work Order.
- E. The total amount of this Agreement, including all of the services detailed in Exhibit A, Scope of Work, and including any Optional Tasks which may be assigned, and inclusive of all work of subconsultants, costs, expenses, and Work Orders shall not exceed \$492,387.00.
- F. Itemized invoices shall follow the format specified by County and shall reference this Agreement number, and the County-supplied Work Order number, if applicable, on their faces. Consultant shall bill County for only one (1) Work Order per invoice.
- G. In accordance with ARTICLE XIV, Prevailing Wage, Consultant shall provide County's Contract Administrator with certified payroll for applicable personnel, including authorized subconsultants, for the period for which payment is requested and such certified payroll shall accompany each invoice submitted. The certified payroll shall contain information related only to the Project. No invoice shall be paid until the certified payroll is submitted.
- H. Copies of documentation attached to invoices shall reflect Consultant's charges for the specific services billed on those invoices. Invoices shall be mailed to County at the following address:

County of El Dorado  
Department of Transportation  
2441 Headington Road  
Placerville, California 95667  
Attn.: John H. Kahling, Deputy Director, Engineering  
Construction Unit

or to such other location as County directs.

- I. In the event that Consultant fails to deliver, in the format specified, the deliverables required by this Agreement, County at its sole option may delay the monthly payment for the period of time of the delay, cease all payments until such time as the required deliverables are received, or proceed as set forth below in ARTICLE XVI, Default, Termination, and Cancellation, herein.

#### **ARTICLE X**

**Consultant to County:** It is understood that the services provided under this Agreement shall be prepared in and with cooperation from County and its staff. It is further understood that this Agreement does not create an exclusive relationship between County and Consultant, and Consultant may perform similar work or services for others. However, Consultant shall not enter into any agreement with any other party, or provide any information in any manner to any other party, that would conflict with Consultant's responsibilities or hinder Consultant's performance of services hereunder, unless County's Contract Administrator, in writing, authorizes that agreement or sharing of information.

#### **ARTICLE XIII**

**Independent Contractor:** The parties intend that an independent contractor relationship will be created by this contract. Consultant is, and shall be at all times, deemed independent and shall be wholly responsible for the manner in which it performs services required by the terms of this Agreement. Consultant exclusively assumes responsibility for acts of its employees, agents, affiliates, and subcontractors, if any are authorized herein, as they relate to the services or work to be performed under this Agreement during the course and scope of their employment by Consultant. Those persons will be entirely and exclusively under the direction, supervision, and control of Consultant.

County may designate the tasks to be performed and the results to be accomplished under this Agreement, provide information concerning the work or services, approve or disapprove the final work product and/or services provided, and set deadlines for the completion of the work or services, but County will not control or direct the manner, means, methods, or sequence in which Consultant performs the work or services for accomplishing the results. Consultant understands and agrees that Consultant lacks the authority to bind County or incur any obligations on behalf of County.

Consultant, including any subcontractor or employees of Consultant, shall not receive, nor be eligible for, any benefits County provides for its employees, including, but not limited to, vacation pay, paid holidays, life insurance, health insurance, social security, disability insurance, pension, or 457 plans. Consultant shall not receive, nor be eligible for, workers' compensation, including medical and indemnity payments. County is not responsible for withholding, and shall not withhold, Federal Income Contribution Act amounts or taxes of any kind from any payments which it owes Consultant. Consultant shall not be subject to the work schedules or vacation periods that apply to County employees.

Consultant shall be solely responsible for paying its employees, and for withholding Federal Income Contribution Act amounts and other taxes, workers' compensation, unemployment compensation, medical insurance, life insurance, or any other benefit that Consultant provides for its employees.

Consultant acknowledges that it has no authority to bind the County or incur any obligations on behalf of the County with regard to any matter, and shall not make any agreements or representations on the County's behalf.

#### **ARTICLE XIV**

**Prevailing Wage:** County requires Consultant's services on public works project(s) involving local and/or state funds which prevailing wage requirements may apply. As a consequence, Consultant shall comply with all applicable state and federal prevailing wage rates, statutes, rules, and regulations then in effect. Consultant shall use the general prevailing wage rates determined by the Director of Industrial Relations for the county in which the work is to be done, which are available at the principal office of County's Department of Transportation. Changes, if any, to the general prevailing wage rates will be available at the same location.

Future effective general prevailing wage rates which have been predetermined and are on file with the California Department of Industrial Relations are referenced but not printed in the general prevailing wage rates.

Consultant shall comply with all applicable wage requirements, as set forth in Labor Code Sections 1770 et seq., 1773.2, 1775, 1776, 1810, and 1813. In accordance with the provisions of Labor Code Section 1810, eight (8) hours of labor shall constitute a legal day's work upon all work done hereunder, and Consultant and any subcontractor authorized under this Agreement shall also conform to and be bound by the provisions of Labor Code Sections 1810 through 1815.

#### **ARTICLE XVI**

##### **Default, Termination, and Cancellation:**

- A. Termination by Default: If either party becomes aware of an event of default, that party shall give written notice of said default to the party in default that shall state the following:
1. The alleged default and the applicable Agreement provision.
  2. That the party in default has ten (10) days upon receiving the notice to cure the default (Time to Cure).

If the party in default does not cure the default within ten (10) days of the Time to Cure, then such party shall be in default and the party giving notice



may terminate the Agreement by issuing a Notice of Termination. The party giving notice may extend the Time to Cure at their discretion. Any extension of Time to Cure must be in writing, prepared by the party in default for signature by the party giving notice, and must specify the reason(s) for the extension and the date in which the extension of Time to Cure expires.

If County terminates this Agreement, in whole or in part, for default:

1. County reserves the right to procure the goods or services, or both, similar to those terminated, from other sources and Consultant shall be liable to County for any excess costs for those goods or services. County may deduct from any payment due, or that may thereafter become due to Consultant, the excess costs to procure from an alternate source.
2. County shall pay Consultant the sum due to Consultant under this Agreement prior to termination, unless the cost of completion to County exceeds the funds remaining in the Agreement. In which case the overage shall be deducted from any sum due Consultant under this Agreement and the balance, if any, shall be paid to Consultant upon demand.
3. County may require Consultant to transfer title and deliver to County any completed work under the Agreement.

The following shall be events of default under this Agreement:

1. Failure by either party to perform in a timely and satisfactory manner any or all of its obligations under this Agreement.
  2. A representation or warranty made by Consultant in this Agreement proves to have been false or misleading in any respect.
  3. Consultant fails to observe and perform any covenant, condition or agreement on its part to be observed or performed under this Agreement, unless County agrees, in writing, to an extension of the time to perform before that time period expires.
  4. A violation of ARTICLE XXXIX, Conflict of Interest.
- B. Bankruptcy: County may terminate this Agreement immediately in the case of bankruptcy, voluntary or involuntary, or insolvency of Consultant.
- C. Ceasing Performance: County may terminate this Agreement immediately in the event Consultant ceases to operate as a business, or otherwise becomes unable to substantially perform any term or condition of this Agreement.
- D. Termination or Cancellation without Cause: County may terminate this Agreement or any Work Order issued pursuant to this Agreement, in whole or in part, for convenience upon thirty (30) calendar days' written Notice of

Termination. If such termination is effected, County will pay for satisfactory services rendered before the effective date of termination, as set forth in the Notice of Termination provided to Consultant, and for any other services that County agrees, in writing, to be necessary for contract resolution. In no event, however, shall County be obligated to pay more than the total amount of the Work Order or the total amount of the Agreement, as applicable. Upon receipt of a Notice of Termination, Consultant shall promptly discontinue all services affected, as of the effective date of termination set forth in such Notice of Termination, unless the Notice directs otherwise. In the event of termination, County reserves the right to take over and complete the work by contract or by any other means.

**IV. The following articles are added in their entirety:**

**ARTICLE XXXVII**

**Force Majeure:** Neither party will be liable for any delay, failure to perform, or omission under this Agreement that is due to any cause that it is beyond its control, not due to its own negligence, and cannot be overcome by the exercise of due diligence. In that event, the affected party will:

1. Promptly give written notice to the other of the fact that it is unable to so perform and the cause(s) that is beyond its control.
2. Once the cause(s) has ceased, provide written notice to the other party and immediately resume its performance under this Agreement.

For purposes of this Article, "cause that is beyond its control" includes labor disturbances, riots, fires, earthquakes, floods, storms, lightning, epidemics, war, disorders, hostilities, expropriation or confiscation of properties, failure of and delays by carriers, interference by civil or military authorities, whether legal or de facto, and whether purporting to act under some constitution, decree, or law, or otherwise, or acts of God.

**ARTICLE XXXVIII**

**Waiver:** No failure on the part of the parties to exercise any rights under this Agreement, and no course of dealing with respect to any right hereunder, shall operate as a waiver of that right, nor shall any single or partial exercise of any right preclude the exercise of any other right. The remedies herein provided are cumulative and are not exclusive of any other remedies provided by law.

**ARTICLE XXXIX**

**Conflict of Interest:** The parties to this Agreement have read and are aware of the provisions of Government Code Section 1090 et seq. and the Political Reform Act of 1974 (Section 87100 et seq.), relating to conflict of interest of public officers and employees. Individuals who are working for Consultant and performing work for County and who are considered to be consultant within the meaning of Title 2, California Code of Regulations, Section 18700.3, as it now reads or may thereafter

be amended, are required to file a statement of economic interest in accordance with County's Conflict of Interest Code. County's Contract Administrator shall at the time this Agreement is executed make an initial determination whether or not the individuals who will provide services or perform work pursuant to this Agreement are consultants within the meaning of the Political Reform Act and County's Conflict of Interest Code. Statements of economic interests are public records subject to disclosure under the California Public Records Act.

Consultant covenants that during the term of this Agreement neither it, or any officer or employee of Consultant, has or shall acquire any interest, directly or indirectly, in any of the following:

1. Any other contract connected with, or directly affected by, the services to be performed by this Agreement.
2. Any other entities connected with, or directly affected by, the services to be performed by this Agreement.
3. Any officer or employee of County that are involved in this Agreement.

If Consultant becomes aware of a conflict of interest related to this Agreement, Consultant shall promptly notify County of the existence of that conflict, and County may, in its sole discretion, immediately terminate this Agreement by giving written notice of termination specified in ARTICLE XVI, Default, Termination, or Cancellation.

#### **ARTICLE XL**

**Electronic Signatures:** Each party agrees that the electronic signatures, whether digital or encrypted, of the parties included in this Agreement, are intended to authenticate this writing and to have the same force and effect as manual signatures. Electronic Signature means any electronic visual symbol or signature attached to or logically associated with a record and executed and adopted by a party with the intent to sign such record, including facsimile or email electronic signatures, pursuant to the California Uniform Electronic Transactions Act (Cal. Civ. Code §§ 1633.1 to 1633.17) as amended from time to time.

Except as herein amended, all other parts and sections of Agreement for Services #157-S1411 shall remain unchanged and in full force and effect.

**IN WITNESS WHEREOF**, the parties hereto have executed this Fifth Amendment to Agreement for Services #157-S1411 on the dates indicated below.

**-- COUNTY OF EL DORADO --**

By: \_\_\_\_\_

Dated: \_\_\_\_\_

Board of Supervisors  
"County"

Attest:  
Kim Dawson  
Clerk of the Board of Supervisors

By: \_\_\_\_\_

Dated: \_\_\_\_\_

Deputy Clerk

**-- MARK THOMAS & COMPANY, INC. --**

By: \_\_\_\_\_

Dated: \_\_\_\_\_

Zach Siviglia  
Chief Executive Officer  
"Consultant"

By: \_\_\_\_\_

Dated: \_\_\_\_\_

Robert M. Brogan, P.E.  
Secretary