

Contract

This public works contract ("Contract") is entered into by and between City of Cupertino ("City") and California Commercial Fence ("Contractor"), for work on the **Regnart Creek Trail Privacy Fencing Project** ("Project").

Recitals

- A. The Project requires construction of privacy fencing along Regnart Creek from Pacific Drive to East End Drive, which is to be performed in two phases, as more fully set forth in the Contract Documents.
- B. On December 18, 2020, the City published a Notice Inviting Bids for the Project. The Notice Inviting Bids established a bid deadline of January 8, 2021.
- C. On January 8, 2021, the City did not receive any bids for the Project.
- D. Therefore, this Contract has been awarded on a negotiated basis, pursuant to Public Contract Code § 22038(c).
- E. Contractor has been informed that the work for Phase 1 of this Project is not anticipated to begin until the City has obtained the necessary rights of entry from the property owners in the Project area.
- F. Contractor has been informed that the work performed under this Contract must be coordinated with related work being performed by a separate contractor for the Regnart Creek Trail Project (the "Trail Project"), which is currently scheduled for completion by December 24, 2021.
- G. Contractor has been informed that the work for Phase 2 of this Project is not anticipated to begin until the Trail Project has been completed.

In light of the foregoing recitals, the parties agree as follows:

- 1. **Award of Contract.** On _____, 20____, City awarded this Contract to Contractor for the amount set forth in Section 4, below.
- 2. **Contract Documents.** The Contract Documents incorporated into this Contract include and are comprised of all of the documents listed below. The definitions provided in Article 1 of the General Conditions apply to all of the Contract Documents, including this Contract.
 - 2.1 Contract and attachment thereto;
 - 2.2 Payment and Performance Bonds;
 - 2.3 General Conditions;
 - 2.4 Special Conditions and attachments thereto;
 - 2.5 Project Plans and Specifications;
 - 2.6 Change Orders, if any;
 - 2.7 Price Schedule; and
 - 2.8 Notice to Proceed; and
 - 2.9 The following: Exhibit A - Mitigation Monitoring or Reporting Program dated May 2020, Exhibit A-A Shelter in Place and Social Distancing Requirements, Exhibit C - Stormwater Pollution Prevention Program (SWPPP) dated December 20, 2020, Valley Water permit 21205 dated February 8, 2021

3. **Contractor's Obligations.** Contractor will perform all of the Work required for the Project, as specified in the Contract Documents. Contractor must provide, furnish, and supply all things necessary and incidental for the timely performance and completion of the Work, including all necessary labor, materials, supplies, tools, equipment, transportation, onsite facilities, and utilities, unless otherwise specified in the Contract Documents. Contractor must use its best efforts to diligently prosecute and complete the Work in a professional and expeditious manner and to meet or exceed the performance standards required by the Contract Documents.
- 3.1 **Licenses.** Contractor and its Subcontractor(s) must possess the California contractor's license(s) in the classification(s) required by law to perform the Work. This Project requires a valid California contractor's license for the following classification(s): Class C13. Contractor and its Subcontractors must also obtain a City business license before performing any Work.
- 3.2 **Payment and Performance Bonds.** Within ten days following the date of Contract award set forth in Section 1, above, Contractor must provide payment and performance bonds, each for 100% of the maximum Contract Price, executed by a surety licensed to do business in the State of California, as further specified in the Contract Documents, using the bond forms included in the Contract Documents. All required bonds must be calculated on the maximum total Contract Price, including additive alternates, if applicable.
- 3.3 **Insurance.** Within ten days following the date of Contract award set forth in Section 1, above, Contractor must provide the insurance certificate(s) and endorsement(s) required by the Contract Documents.
4. **Payment.** As full and complete compensation for Contractor's timely performance and completion of the Work in strict accordance with the terms and conditions of the Contract Documents, City will pay Contractor \$1,504,069.60 ("Contract Price") for all of Contractor's direct and indirect costs to perform the Work, including all labor, materials, supplies, equipment, taxes, insurance, bonds and all overhead costs, in accordance with the payment provisions in the General Conditions, and subject to adjustment pursuant to subsection 4.1, and 4.2, below.
- 4.1 **Price Schedule.** The item price(s) listed in the Price Schedule include all costs to perform the Work as specified, including all labor, material, supplies, and equipment and all other direct or indirect costs such as applicable taxes, insurance and overhead. The quantities shown on the Price Schedule are estimated and the actual quantities required to perform the Work may be greater or less than the estimated amount. The Contract Price will be adjusted to reflect the actual quantities required for the Work based on the itemized or unit prices provided in the Price Schedule, with no allowance for anticipated profit for quantities that are deleted or decreased, and no increase in the unit price, and without regard to the percentage increase or decrease of the estimated quantity and the actual quantity.
- (A) The estimated quantities in the Price Schedule reflect that 13 of the property owners in the Project area have expressed a preference for concrete fencing instead of wood fencing. If actual quantities vary from the estimated quantities in the Price Schedule because more or less than 13 property owners elect to have concrete fencing instead of wood fencing, Contractor may submit a Change Order request pursuant to Article 6 of the General Conditions, to request an adjustment to the Contract Price, pursuant to this paragraph.

4.2 Partial Payment for Materials. Due to price volatility and supply chain challenges within the wood industry, Contractor may elect to purchase all wood fencing materials following award of the Contract on the date specified in Section 1, above, and before the City has issued a Notice to Proceed, as further specified in Section 5, below, with respect to materials for the following items on the Price Schedule: 12 (Wood Fences - 7'), 13 (Wood Fences - 8'), 19 (Wood Composite Fence - 7'), 20 (Wood Composite Fence - 8'), and 22 (Modify Wood Fence). If Contractor elects to purchase the wood fencing materials in advance for one or of these Price Schedule items, Contractor will be entitled to reimbursement for these wood fencing materials subject to the following terms and conditions:

- (A) Each such advance procurement is subject to the City's advance written approval as to the proposed purchase price and quantity, and confirmation that the material meets the Project specifications.
- (B) Contractor must store the materials until needed for the Project in a secure location, subject to prior written approval by the City.
- (C) Contractor may submit an invoice, attaching proof of purchase, including receipts and delivery tags, for reimbursement for the cost of the materials within 30 days following purchase of the materials, even if it has not yet commenced Work on the Project.
- (D) Provided the invoiced amount is adequately substantiated, Contractor will be reimbursed for the full price for the advance procurement, including tax and shipping costs.
- (E) Ownership of the materials will pass to City upon payment for the materials, but Contractor will retain responsibility for protecting the materials from weather, damages, theft, or destruction until the materials have been installed on the Project, and the Project has been accepted by the City.
- (F) If this Contract is terminated early pursuant to Article 13 of the General Conditions, Contractor must deliver all unused materials to a site specified by the City in the notice of termination, within 14 days, unless a longer period is specified in the notice of termination.

5. Time for Completion. The Project will be completed in two phases to coordinate this Work with work being performed for the related Trail Project. Following City's issuance of a Notice to Proceed, Contractor will fully complete the Phase 1 Work, which is located on the side of Regnart Creek opposite to where the Regnart Creek Trail is being constructed pursuant to the Trail Project, as shown on the Project Phase Location Map attached hereto, by December 24, 2021. The City anticipates notifying Contractor that it may proceed with the Phase 2 Work on or about December 24, 2021, assuming that the Trail Project is completed by then. Following City's notification that it must proceed with Phase 2, Contractor will fully complete the Phase 2 Work, which is located on the trail side of Regnart Creek, as shown on the attached Project Phase Location Map, within 145 working days from the start date specified in the Phase 2 notification, at which time the Project must achieve Final Completion ("Contract Time"). The notification to begin the Phase 2 Work may also include a request for submitting an updated schedule within ten days following the date of the notification, showing Final Completion by the Contract Time in accordance with the schedule requirements in Article 5 of the General Conditions. By signing below, Contractor expressly waives any claim for delayed early completion.

6. **Liquidated Damages.** Time is of the essence in completion of the Work. Until the Work on the Project and the Trail Project are both complete, City will be unable to open the trail to the public. If Contractor fails to complete the Work, including both Phase 1 and Phase 2, within the Contract Time, City will assess liquidated damages in the amount of \$1,000.00 per day for each day of unexcused delay in completion, and such liquidated damages may be deducted from City's payments due or to become due to Contractor under this Contract.
7. **Labor Code Compliance.**
- 7.1 **General.** This Contract is subject to all applicable requirements of Chapter 1 of Part 7 of Division 2 of the Labor Code, including requirements pertaining to wages, working hours and workers' compensation insurance, as further specified in Article 9 of the General Conditions.
- 7.2 **Prevailing Wages.** This Project is subject to the prevailing wage requirements applicable to the locality in which the Work is to be performed for each craft, classification or type of worker needed to perform the Work, including employer payments for health and welfare, pension, vacation, apprenticeship and similar purposes. These prevailing rates are on file with the City and are available online at <http://www.dir.ca.gov/DLSR>. Each Contractor and Subcontractor must pay no less than the specified rates to all workers employed to work on the Project. The schedule of per diem wages is based upon a working day of eight hours. The rate for holiday and overtime work must be at least time and one-half.
- 7.3 **DIR Registration.** Contractor and each Subcontractor must be registered with the California Department of Industrial Relations ("DIR") to perform work on public projects. City may not enter into the Contract with Contractor without proof that Contractor and its Subcontractors are registered with the DIR pursuant to Labor Code § 1725.5, subject to limited legal exceptions.
- 7.4 **Compliance.** The Contract will be subject to compliance monitoring and enforcement by the DIR, under Labor Code § 1771.4.
8. **Workers' Compensation Certification.** Pursuant to Labor Code § 1861, by signing this Contract, Contractor certifies as follows: "I am aware of the provisions of Labor Code § 3700 which require every employer to be insured against liability for workers' compensation or to undertake self-insurance in accordance with the provisions of that code, and I will comply with such provisions before commencing the performance of the Work on this Contract."
9. **Conflicts of Interest.** Contractor, its employees, Subcontractors and agents, may not have, maintain or acquire a conflict of interest in relation to this Contract in violation of any City ordinance or requirement, or in violation of any California law, including Government Code § 1090 et seq., or the Political Reform Act, as set forth in Government Code § 81000 et seq. and its accompanying regulations. Any violation of this Section constitutes a material breach of the Contract.
10. **Independent Contractor.** Contractor is an independent contractor under this Contract and will have control of the Work and the means and methods by which it is performed. Contractor and its Subcontractors are not employees of City and are not entitled to participate in any health, retirement, or any other employee benefits from City.
11. **Subcontractor Work Limits.** Contractor must perform at least 51% of the Work on the Project, calculated as a percentage of the Contract Price, with its own forces, except for any Work identified as "Specialty Work" in the Contract Documents. The total amount for

any such Specialty Work, as shown on the Price Schedule, may be deducted from the Contract Price before computing the 51% self-performance requirement. The remaining Work may be performed by qualified Subcontractor(s).

- 12. Ineligible Subcontractor.** Any Subcontractor who is ineligible to perform work on a public works project under Labor Code §§ 1777.1 or 1777.7 is prohibited from performing work on the Project.
- 13. Utility Company Standards.** The Project must be completed in a manner that satisfies the standards and requirements of any affected utility companies or agencies (collectively, "utility owners"). Contractor may be required by the third party utility owners to provide detailed plans prepared by a California registered civil engineer showing the necessary temporary support of the utilities during coordinated construction work. Contractor is directed to contact any affected third party utility owners about their requirements before executing the Contract.
- 14. Brand Designations and "Or Equal" Substitutions.** Any specification designating a material, product, thing, or service by specific brand or trade name, followed by the words "or equal," is intended only to indicate quality and type of item desired, and Contractor may request use of any equal material, product, thing, or service. All data substantiating the proposed substitute as an equal item must be submitted with the written request for substitution. A request for substitution must be submitted within 35 days after the date of award of the Contract unless otherwise provided in the Contract Documents. This provision does not apply to materials, products, things, or services that may lawfully be designated by a specific brand or trade name under Public Contract Code § 3400(c).
- 15. Reservation of Rights.** City reserves the unfettered right, acting in its sole discretion, to postpone or abandon the Project entirely or to perform all or part of the Work with its own forces. City reserves the right to issue the Notice to Proceed when the City determines, in its sole discretion, the appropriate time for commencing the Work. The City expressly disclaims responsibility for any assumptions Contractor might draw from the presence or absence of information provided by the City in any form.
- 16. Contractor's Certifications and Warranties.** By signing this Contract, Contractor certifies and warrants the following:
 - 16.1 Examination of Contract Documents.** Contractor has thoroughly examined the Contract Documents and represents that, to the best of Contractor's knowledge, there are no errors, omissions, or discrepancies in the Contract Documents, subject to the limitations of Public Contract Code § 1104.
 - 16.2 Examination of Worksite.** Contractor has had the opportunity to examine the Worksite and local conditions at the Project location. Contractor is responsible for knowledge of conditions and requirements which reasonable review and investigation would have disclosed.
 - 16.3 Contractor Responsibility.** Contractor is a responsible contractor, with the necessary ability, capacity, experience, skill, qualifications, workforce, equipment, and resources to perform or cause the Work to be performed in accordance with the Contract Documents and within the Contract Time.
 - 16.4 Responsibility for Price Schedule.** Contractor has carefully reviewed its Price Schedule and is solely responsible for any errors or omissions contained in its Price Schedule. Contractor is solely responsible for all of its costs to prepare its Price

Schedule, including site investigation costs, and by submitting its Price Schedule waives any right to recover those costs from City.

- 17. Notice.** Any notice, billing, or payment required by or pursuant to the Contract Documents must be made in writing, signed, dated and sent to the other party by personal delivery, U.S. Mail, a reliable overnight delivery service, or by email as a PDF file. Notice is deemed effective upon delivery, except that service by U.S. Mail is deemed effective on the second working day after deposit for delivery. Notice for each party must be given as follows:

City:

City of Cupertino
Public Works Department
10300 Torre Avenue
Cupertino, California, 95014
Phone: (408) 777-3354
Attn: Director of Public Works
Email: rogerl@cupertino.org

Copy to: Project Manager
davids@cupertino.org

Contractor:

Name: California Commercial Fence
Address: 2390 Alluvial
City/State/Zip: Clovis, CA 93611
Phone: 559-575-8204
Attn: Shawn Price
Email: shawn@calicommercialfence.com
Copy to: _____

18. General Provisions.

- 18.1 Assignment and Successors.** Contractor may not assign its rights or obligations under this Contract, in part or in whole, without City's written consent. This Contract is binding on Contractor's and City's lawful heirs, successors and permitted assigns.
- 18.2 Third Party Beneficiaries.** There are no intended third party beneficiaries to this Contract.
- 18.3 Governing Law and Venue.** This Contract will be governed by California law and venue will be in the Santa Clara County Superior Court, and no other place. Contractor waives any right it may have pursuant to Code of Civil Procedure § 394, to file a motion to transfer any action arising from or relating to this Contract to a venue outside of Santa Clara County, California.
- 18.4 Amendment.** No amendment or modification of this Contract will be binding unless it is in a writing duly authorized and signed by the parties to this Contract.
- 18.5 Integration.** This Contract and the Contract Documents incorporated herein, including authorized amendments or Change Orders thereto, constitute the final, complete, and exclusive terms of the agreement between City and Contractor.

- 18.6 Severability.** If any provision of the Contract Documents is determined to be illegal, invalid, or unenforceable, in whole or in part, the remaining provisions of the Contract Documents will remain in full force and effect.
- 18.7 Iran Contracting Act.** If the Contract Price exceeds \$1,000,000, Contractor certifies, by signing below, that it is not identified on a list created under the Iran Contracting Act, Public Contract Code § 2200 et seq. (the "Act"), as a person engaging in investment activities in Iran, as defined in the Act, or is otherwise expressly exempt under the Act.
- 18.8 Authorization.** Each individual signing below warrants that he or she is authorized to do so by the party that he or she represents, and that this Contract is legally binding on that party. If Contractor is a corporation, signatures from two officers of the corporation are required pursuant to California Corporation Code § 313.

The parties agree to this Contract as witnessed by the signatures below:

CITY:

Approved as to form:

s/ _____

s/ _____

Name, Title

Name, Title

Date: _____

Date: _____

Attest:

s/ _____

Name, Title

Date: _____

CONTRACTOR:

Business Name

s/ _____

Seal:

Name, Title

Date: _____

Second Signature (See Section 18.8):

s/ _____

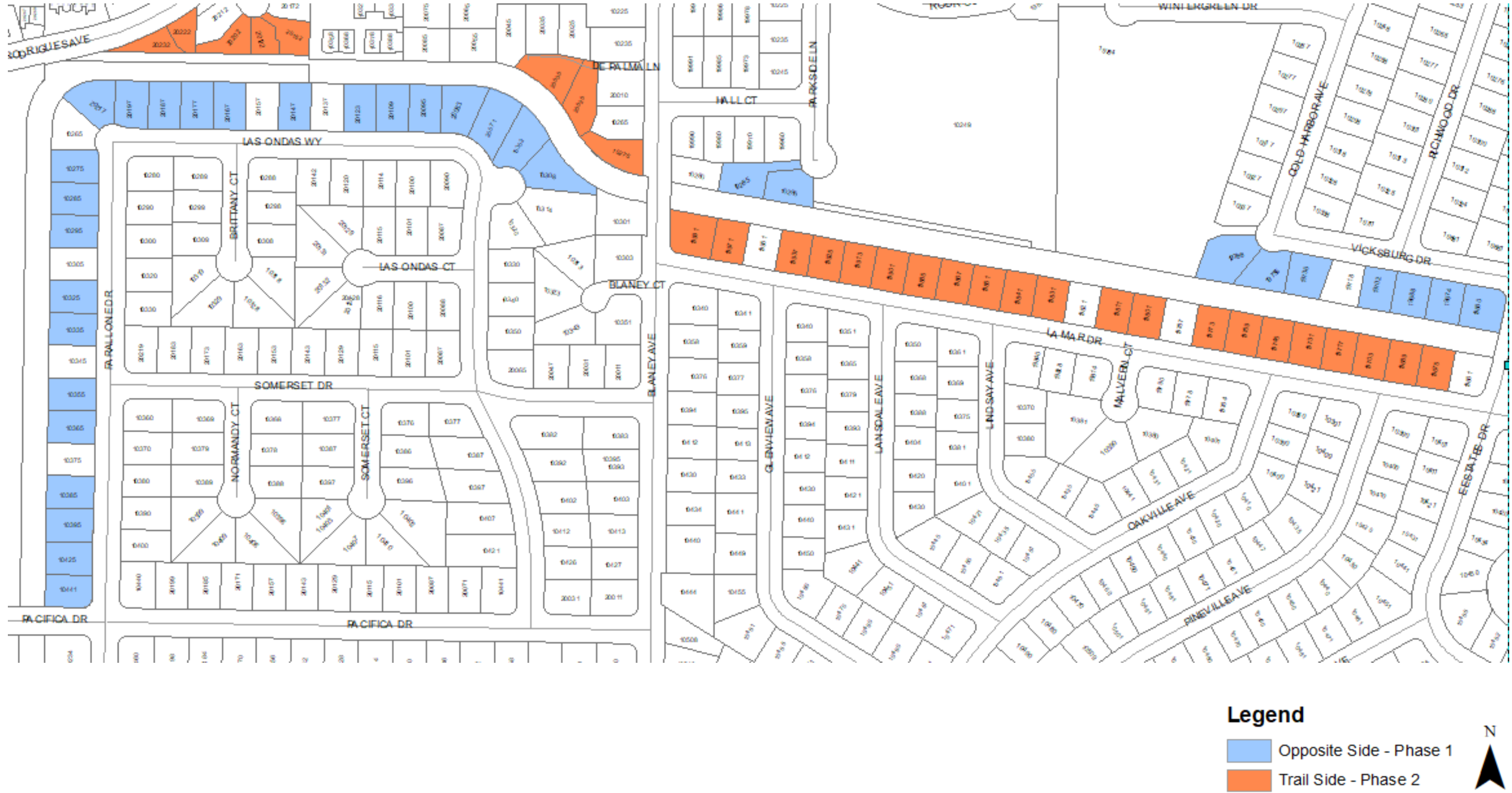
Name, Title

Date: _____

Contractor's California License Number(s) and Expiration Date(s)

Contractor's DIR Registration Number

PROJECT PHASE LOCATION MAP



END OF CONTRACT