

Standard City of San José Consultant Agreement

(Non-Capital Projects)

This Agreement is between the City of San José, a municipal corporation (“City”), and The Ecohero Show, LLC, a California limited liability company (“Consultant”).

This Agreement is made and entered into this 7th day of February 2022 (“Contract Date”).

THE CITY AND CONSULTANT AGREE AS FOLLOWS:

1. AGREEMENT SCOPE

- 1.1 **General:** This Agreement sets forth the terms and conditions under which the Consultant will provide professional consulting services to the City.
- 1.2 **Exhibits:** This Agreement consists of this agreement form and the following exhibits, which are incorporated herein by reference:
- | | |
|-------------------|---|
| Exhibit A: | Scope of Basic Services |
| Exhibit B: | Compensation |
| Exhibit C: | Insurance Requirements |
| Exhibit D: | Employee/Volunteer Clearance Verification and Compliance with the Child Abuse and Neglect Reporting Act |
- 1.3 **Director:** “Director” means the Director of the Environmental Services Department or the Director’s designee.
- 1.4 **Business Days:** “Business Day” and “Business Days” means the day(s) on which City Hall is open to conduct business.
- 1.5 **Entire Agreement:** This Agreement is the final, complete and exclusive understanding of the parties as to the matters contained herein. It supersedes all prior communications and understandings regarding such matters.
- 1.6 **Amendments:** This Agreement may be modified only by a written amendment executed by the parties.

2. AGREEMENT TERM

The Agreement term is from the Contract Date to June 30, 2022, inclusive, unless terminated earlier pursuant to Section 19 below.

3. SCOPE OF SERVICES

- 3.1 **Basic Services:** “Basic Services” means the services set forth in **Exhibit A**. The Consultant must perform the Basic Services to the Director’s satisfaction.

3.2 Additional Services: “Additional Services” means the following: (a) services that are included in the Basic Services but exceed the specified level of the Basic Services, or (b) services that relate but are not included in the Basic Services.

3.2.1 Authorization: The City will not compensate Consultant for any Additional Services without the Director’s prior written authorization.

3.2.2 Director’s Authorization: The Director may authorize the Consultant to perform Additional Services up to the cumulative, maximum amount set forth in **Exhibit B** for such services. The Director must authorize the Consultant to perform Additional Services through a written amendment executed by both parties. The written amendment must set forth the scope of the Additional Services, the schedule for completing such services, and the amount and method of compensating the Consultant for such services. The Director is authorized to execute the amendment for Additional Services for the City.

4. INTENTIONALLY OMITTED

5. CITY’S CONTRACT MANAGER

The City’s contract manager for this Agreement is:

Name: Linden Skjeie	Phone No.: (408) 975-2577
Department: Environmental Services	E-mail: linden.skjeie@sanjoseca.gov
Address: 200 E. Santa Clara St, 10 th Floor, San José, CA 95113	

The Director can change the above contract manager by giving the Consultant written notice.

6. CONSULTANT’S STAFFING

6.1 Consultant’s Contract Manager and Other Staffing: Identified below are the following: (a) the Consultant’s contract manager, and (b) the Consultant(s) and/or employee(s) of the Consultant who will be principally responsible for providing the Basic Services. If any individual identified below is required to file a Statement of Economic Interests, Form 700 (“Form 700”), and the individual does not have a current Form 700 on file with the City Clerk for a separate agreement with the City, the Consultant must comply with the requirements of Subsection 17.2 below.

<u>Consultant’s Contract Manager</u>		<u>Required to File Form 700?</u>		
		Yes Already Filed (Insert Date Filed)	Yes Need to File	No
Name: Brett Edwards	Phone No.: (888) 482-3885			X
Address: 2012 W. Alluvial Ave. Fresno, CA 93711	E-mail: ecoheroshow@gmail.com			

<u>Other Staffing</u>				
<u>Name:</u>	<u>Assignment:</u>			
1.				
2.				
3.				

6.2 Contract Manager’s Authority: The Consultant’s contract manager is authorized to act on behalf of the Consultant.

6.3 Staffing Changes: The Director’s prior written approval is required for the Consultant to remove, replace or add to any of its staffing identified in this provision.

7. USE OF SUBCONSULTANTS

7.1 Authority to Use: Whichever of the following is marked applies to this Agreement:

- The Consultant can **not** use any subconsultants without the Director’s prior written approval.
- The Consultant will use the following subconsultants for the specified areas of work. The Consultant can not remove, replace or add to any of the subconsultants identified in this provision without the Director’s prior written approval.

Subconsultant’s Name	Area of Work
1.	
2.	
3.	

7.2 Subconsultant Work: The Consultant warrants all services and deliverables provided by any subconsultants it uses, and represents that each such subconsultant is specially trained, experienced, and competent to perform its portion of the work.

8. INDEPENDENT CONTRACTOR

8.1 General: The Consultant has complete control over its operations and employees, and is an independent contractor. The Consultant is not an agent or employee of the City, and shall not represent or act as the City’s agent or employee. The Consultant does not have any rights to retirement benefits or other benefits accruing to City employees, and expressly waives any claim it may have to any such rights.

8.2 Subcontractors: As an independent contractor, the Consultant has complete control over its subconsultants, subcontractors, suppliers, agents and any other person or entity with whom the Consultant contracts in furtherance of this Agreement (collectively “Subcontractors”). Subject to

the requirements of Section 7 of this Agreement, the Consultant is solely responsible for selecting, managing and compensating its Subcontractors, and for ensuring they comply with this Agreement.

- 8.3** **Indemnity**: The Consultant shall place in each Subcontractor agreement indemnity obligations in favor of the City in the exact form and substance of those contained in Section 11 below.

9. STANDARD OF PERFORMANCE

The Consultant represents that it possesses all necessary training, licenses and permits needed to perform the Basic Services. The Consultant represents that its performance of the Basic Services will conform to the standard of practice of a professional that specializes in performing professional services of a like nature and complexity.

10. COMPENSATION

- 10.1** **Maximum Total Compensation**: The maximum amount the City will pay the Consultant for all professional fees, costs, charges and expenses related to performing Basic Services and any Additional Services is \$10,000 ("Maximum Total Compensation").

- 10.2** **Intentionally Omitted**.

- 10.3** **Exhibit B - Compensation**: The City will pay the Consultant up to the Maximum Total Compensation in accordance with **Exhibit B**.

10.3.1 **Compensation Table**: **Exhibit B** sets forth a compensation table establishing the manner in which the City will pay the Maximum Compensation to the Consultant ("Compensation Table"). The Compensation Table is subject to the terms and conditions set forth below in Subsections 10.4 through 10.7.

10.3.2 **Schedule of Rates and Charges**: If the City will compensate the Consultant for any Basic Services on a time-and-materials basis, then **Exhibit B** also sets forth a schedule of the Consultant's rates and charges ("Schedule of Rates and Charges"). The Schedule of Rates and Charges is subject to the following requirements:

10.3.2.1 **Premium Pay**: "Premium Pay" is a special pay rate for working during times that are less desirable, such as weekends, holidays or late shifts. The City will not pay Consultant Premium Pay.

10.3.2.2 **No Increases**: The City will **not** increase the Schedule of Rates and Charges during the Agreement term.

10.3.2.3 **Conflict**: In the event of a discrepancy between this Section and the Schedule of Rates and Charges, this Section governs.

- 10.4** **Compensation Table – Part 1**: Part 1 of the Compensation Table addresses compensation for the various tasks included in the Basic Services. The following terms and conditions apply to Part 1 of the Compensation Table.

10.4.1 **Task Numbers (Column 1)**: Column 1 sets forth the task number(s) for which the City will compensate the Consultant. Each task number corresponds to the same task number in **Exhibit A**. If a task number included in **Exhibit A** is not included in the Compensation Table, then the City will not compensate the Consultant separately for that

task, and payment for such task is deemed included in the other task(s) for which the Consultant is receiving compensation.

10.4.2 Basis of Compensation (Column 2): Column 2 identifies whether the City will pay the Consultant for the task(s) on a time-and-materials basis or on a fixed-fee (lump-sum) basis.

10.4.3 Invoice Period (Column 3): Column 3 identifies when the Consultant must submit its invoice for payment. If invoicing is monthly, the Consultant must submit its invoice to the City by the 10th Business Day of each month for work completed during the previous month. If invoicing is upon the completion of a task or group of tasks, the Consultant must submit its invoice to the Director within 20 Business Days following completion of the task(s) to the Director's satisfaction. If invoicing is upon the completion of all work, the Consultant must submit its invoice to the Director within 20 Business Days following completion of all work to the Director's satisfaction.

10.4.3.1 Invoice: Each invoice must include sufficient information and supporting documents to establish to the Director's satisfaction that the Consultant is entitled to the payment requested. The City will pay the undisputed portion of the invoice amount within 20 Business Days of the Director's approval of such undisputed amount.

10.4.3.2 Invoices Based on Time and Materials: If time and materials is the basis of compensation, then the Consultant will base its invoice on the hours, professional fees, costs, and charges associated with the work completed during the invoice period. If the Consultant is entitled to reimbursable expenses and/or separate payment for subconsultant costs, the invoice will include such expenses and/or costs associated with the work completed during the invoice period. The City will compensate the Consultant in accordance with the Schedule of Rates and Charges included in **Exhibit B**.

10.4.3.3 Monthly Invoices Based on Fixed Fee: If the Consultant invoices monthly for a "fixed fee," then the Consultant will base its monthly invoice on the percentage of work completed during the previous month. If the Consultant is entitled to reimbursable expenses and/or separate payment for subconsultant costs, the invoice will include such expenses and/or costs incurred during the previous month.

10.4.4 Compensation (Column 4): Column 4 sets forth the total compensation the City will pay the Consultant for completing the task(s).

10.4.4.1 Time & Materials: If time and materials is the basis of compensation, then the amount in Column 4 is a "not-to-exceed" or maximum amount. Any hours worked for which payment would result in a total exceeding the amount in Column 4 is at no cost to the City. If the Consultant completes the task(s) for less than the amount set forth in Column 4, the Director (in the Director's sole discretion) **may** use the cost savings to increase the budget of another task. The Director must authorize such reallocation of cost savings in writing.

10.4.4.2 Fixed Fee: If "fixed fee" is the basis of compensation, then the Consultant must complete the task(s) for the amount set forth in Column 4. Any hours worked for which payment would result in a total exceeding the amount in Column 4 are at no cost to the City.

10.5 Compensation Table – Part 2: Part 2 of the Compensation Table indicates whether or not the City will reimburse the Consultant separately for expenses incurred in providing the work. The following terms and conditions apply if the City reimburses the Consultant separately for expenses.

10.5.1 Subconsultants: The cost of subconsultants is not treated as a reimbursable expense. Subsection 10.6 of this Agreement addresses payment for the cost of subconsultants.

10.5.2 Maximum Amount of Reimbursable Expenses: The City will reimburse the Consultant for expenses up to the maximum amount set forth in the last column of Part 2. Any expenses that the Consultant incurs in excess of the stated maximum are at no cost to the City.

10.5.3 Expenses That Are Reimbursable: Any reimbursement to the Consultant is limited to the expenses set forth below in the Reimbursable Expense Schedule. The City will reimburse these expenses at actual cost only unless a markup is specified.

Reimbursable Expense Schedule		Mark Up
1.	The cost of mailing, shipping and/or delivery of any documents or materials.	No Markup
2.	The cost of photographing, printing, reproducing and/or copying any documents or materials.	No Markup
3.	Telephone and facsimile transmission charges.	No Markup
4.	The rental of any specialized equipment to the extent the City's contract manager has preapproved, in writing, the cost of such rental.	As specified, not to exceed 10%
5.	With the written pre-authorization of the City's contract manager, mileage and other travel-related expenses to the same extent that the City reimburses its employees pursuant to the Employee Travel Policy (City Policy Manual, Sections 1.8.2 and 1.8.3). The Consultant acknowledges that it has received a copy of Sections 1.8.2 and 1.8.3 and is familiar with these sections of the Employee Travel Policy.	No Markup
6.	Any other expenses expressly identified in Exhibit B as being reimbursable.	As specified, not to exceed 10%

10.6 Compensation Table – Part 3: Part 3 indicates whether the City will compensate the Consultant separately for subconsultant costs incurred in providing any part of the services. If the City will compensate the Consultant for subconsultant costs, the City will do so in accordance with the following terms and conditions.

10.6.1 Actual Costs: The Consultant can invoice the City for no more than the actual cost of each subconsultant plus a specified markup not to exceed 5 percent.

10.6.2 Schedule of Rates and Charges: Any subconsultant rates and charges set forth in the Schedule of Rates and Charges, if one is included in **Exhibit B**, must be the

subconsultant's actual rates and charges exclusive of any markup. The City will compensate the Consultant in accordance with those rates and charges.

10.6.3 Maximum Amount: The City will compensate the Consultant for all subconsultants in a total amount not to exceed the amount set forth in the last column of Part 3. Any additional subconsultant costs that the Consultant incurs in excess of the specified maximum amount are at no cost to the City.

10.7 Compensation Table – Part 4: Part 4 sets forth the maximum compensation that the Director can authorize for Additional Services in accordance with Subsection 3.2 above. Any Additional Services performed by the Consultant that would result in compensation exceeding this maximum amount is at no cost to the City.

10.8 Tax Forms Required: The following are conditions on the City's obligation to process any payment pursuant to this Agreement:

10.8.1 U.S. Based Person or Entity: If the Consultant is a U.S. based person or entity, the Consultant acknowledges and agrees that the Consultant is required to provide the City with a properly completed Internal Revenue Service Form W-9 before the City will process payment. If the Consultant is a U.S. based person or entity, but has neither a permanent place of business in California nor is registered with the California Secretary of State to do business in California, the Consultant acknowledges and agrees that the Consultant is required to provide the City with a properly completed California Franchise Tax Board form related to nonresident withholding of California source income.

10.8.2 Non-U.S. Based Person or Entity: If the Consultant is not a U.S. based person or entity, the Consultant acknowledges and agrees that the Consultant is required to provide the City with the applicable Internal Revenue Service form related to its foreign status and a California Franchise Tax Board form related to nonresident withholding before the City will process payment.

11. INDEMNIFICATION

11.1 Obligation: The Consultant shall defend, indemnify and hold harmless the City and its officers, employees and agents against all claims, losses, damages, injuries, expenses or liabilities that – directly or indirectly, or in whole or in part - arise out of, pertain to, or relate to any of the following:

- The Consultant's negligent performance of all or any part of the Basic Services and any Additional Services; or
- Any negligent act or omission, recklessness or willful misconduct of the Consultant, any of its Subcontractors, anyone directly or indirectly employed by either the Consultant or any of its Subcontractors, or anyone that they control; or
- Any infringement of the patent rights, copyright, trade secret, trade name, trademark, service mark or any other proprietary right of any person(s) caused by the City's use of any services, deliverables or other items provided by the Consultant pursuant to the requirements of this Agreement; or
- Any breach of this Agreement.

- 11.2 **Limitation on Obligation:** The obligation in Subsection 11.1 above shall not apply to the extent that any claim, loss, damage, injury, expense or liability results from the sole negligence or willful misconduct of the City or its officers, employees or agents.
- 11.3 **Duty to Defend:** The Consultant's obligation in Subsection 11.1 above applies to the maximum extent allowed by law and includes defending the City, its officers, employees and agents as set forth in Sections 2778 and 2782.8 of the California Civil Code. Upon the City's written request, the Consultant, at its own expense, shall defend any suit or action that is subject to the obligation in Subsection 11.1 above.
- 11.4 **Insurance:** The City's acceptance of any insurance in accordance with Section 12 does not relieve the Consultant from its obligations under this Section 11. The Consultant's obligations under this Section 11 apply whether or not the insurance required by the Agreement covers any damages or claims for damages.
- 11.5 **Survival:** The Consultant's obligations under this Section 11 survive the expiration or earlier termination of the Agreement.

12. INSURANCE REQUIREMENTS

- 12.1 **General:** The Consultant shall comply with the insurance requirements set forth in **Exhibit C** for the Agreement term.
- 12.2 **Documentation:** Before performing any services, the Consultant must submit to the City's designated risk manager ("Risk Manager"), for the Risk Manager's written approval, all documents demonstrating compliance with the requirements of **Exhibit C**.
- 12.3 **Changes:** The Risk Manager may amend or waive, in writing, any of the requirements contained in **Exhibit C**.

13. OWNERSHIP OF WORK PRODUCT

- 13.1 **Non-Exclusive License:** In addition to the presentations to the schools, Consultant grants the City a non-exclusive right and license to use the specific slides consultant creates for the City around "Recycling Right" in San Jose as defined in Exhibit "A". Once created, the Consultant will provide the slides to the City by email. The City may use these slides in advertising, education, and outreach with attribution to Consultant. The parties acknowledge that the City has no control over whether the students or schools record the Recycle Right Presentation. The City may alter or otherwise change the slides of the Recycle Right Presentation that consultant creates in its sole discretion and without notice to Consultant. The Consultant waives any rights under the Visual Artists Rights Act of 1990, or the California Art Preservation Act to the extent such section apply as to the City's use of the Recycle Right Presentation.
- 13.2 **Intentionally Omitted:**
- 13.4 **Intentionally omitted.**

14. DISCLOSURE OF WORK PRODUCT

- 14.1 **Prohibition:** Except as authorized by the Director or as otherwise required by law, the Consultant shall not disclose any of the following to a third party: (a) Work Product, (b) discussions between the City and Consultant, or (c) information prepared, developed or received by the Consultant or any of its Subcontractors in the course of performing services pursuant to this Agreement.

- 14.2 Notification:** The Consultant will immediately notify the Director if it is requested by a third party to disclose any Work Product, discussions or information that the Consultant is otherwise prohibited from disclosing.
- 14.3 Limit on Prohibition:** The prohibition in Subsection 14.1 above does not apply to disclosures between the Consultant and its Subcontractors that are needed to perform the Basic Services.
- 14.4 Survival:** This Section 14 survives the expiration or earlier termination of this Agreement.

15. AUDIT/INSPECTION OF RECORDS

- 15.1 Retention Period:** The Consultant shall retain the following records (collectively "Records") for a minimum of 3 years from the date of the City's final payment to the Consultant under this Agreement or for any longer period required by law:
- All ledgers, books of accounts, invoices, vouchers, canceled checks, and other records relating to the Consultant's charges for performing services, or to the Consultant's expenditures and disbursements charged to the City; and
 - All Work Product and other records evidencing Consultant's performance.
- 15.2 Producing Records:** At any time during the Agreement term or during the period of time that the Consultant is required to retain the Records, the City Manager, the Director, the City Attorney, the City Auditor, or a designated representative of any of these officers may request, in writing, production of all or a portion of the Records. The Consultant shall produce the requested Records at City Hall during normal business hours, or at any other location and time mutually agreed upon by the parties. The Consultant shall produce the requested Records at no cost to the City.
- 15.3 State Auditor:** In accordance with Government Code Section 8546.7, the Consultant may be subject to audit by the California State Auditor with regard to the Consultant's performance of this Agreement if the compensation under this Agreement exceeds \$10,000.

16. NON-DISCRIMINATION/NON-PREFERENCE

- 16.1 Prohibition:** The Consultant shall not discriminate against, or grant preferential treatment to, any person on the basis of race, sex, color, age, religion, sexual orientation, actual or perceived gender identity, disability, ethnicity or national origin. This prohibition applies to recruiting, hiring, demotion, layoff, termination, compensation, fringe benefits, advancement, training, apprenticeship and other terms, conditions, or privileges of employment, subcontracting and purchasing.
- 16.2 Intentionally Omitted.**
- 16.3 Subcontracts:** The Consultant shall include Subsection 16.1 of this Agreement in each subcontract that it enters into in furtherance of this Agreement.

17. CONFLICT OF INTEREST

- 17.1 General:** The Consultant represents that it is familiar with the local and state conflict of interest laws, and agrees to comply with those laws in performing this Agreement. The Consultant certifies that, as of the Contract Date, it was unaware of any facts constituting a conflict of interest or creating an appearance of a conflict of interest. The Consultant shall avoid all conflicts of

interest or appearances of conflicts of interest in performing this Agreement. The Consultant has the obligation of determining if the manner in which it performs any part of this Agreement results in a conflict of interest or an appearance of a conflict of interest, and shall immediately notify the City in writing if it becomes aware of any facts giving rise to a conflict of interest or the appearance of a conflict of interest.

17.2 Filing Form 700: In accordance with the California Political Reform Act (Government Code Section 81000 et seq.), the Consultant shall cause each person performing services under this Agreement, and identified as having to file a Form 700 to do each of the following:

- Disclose the categories of economic interests in Form 700 as required by the Director;
- Complete and file the Form 700 no later than 30 calendar days after the person begins performing services under this Agreement and all subsequent Form 700s in conformance with the requirements specified in the California Political Reform Act; and
- File the original Form 700 with the City's Clerk with a copy submitted to the Director.

17.3 Future Services: The Consultant acknowledges each of the following with regard to performing future services for the City:

- The Consultant's performance of the services required by this Agreement may create an actual or appearance of a conflict of interest with regard to the Consultant performing or participating in the performance of some related **future** services, particularly if the services required by this Agreement comprise one element or aspect of a multi-phase process or project;
- Such an actual or appearance of a conflict of interest would be a ground for the City to disqualify the Consultant from performing or participating in the performance of such future services; and
- The Consultant is solely responsible for considering what potential conflicts of interest, if any, performing the services required by this Agreement might have on its ability to obtain contracts to perform future services.

18. ENVIRONMENTALLY PREFERABLE PROCUREMENT POLICY

18.1 General: The Consultant shall perform its obligations under the Agreement in conformance with City Council Policy 1-19, entitled "Prohibition of City Funding for Purchase of Single Serving Bottled Water," and City Council Policy 4-6, entitled "Environmentally Preferable Procurement Policy."

18.2 Prohibition of City Funding for Purchase of Single Serving Bottled Water: The City's policy is that City funds should not be used for the purchase of single-serving bottled water except for any of the following:

- Public safety emergencies, investigations and extended deployments or activation of the Office of Emergency Services;
- Situations where there is a high risk of cross-contamination with non-potable water; or

- ☐ Situations where there are no reasonable alternatives to bottled water, such as large public events and when large quantities of water need to be distributed for health and safety reasons.

An invoice seeking reimbursement from City for the cost of single-serving bottled water under one of the above exceptions must be accompanied by a waiver form provided by the City and signed by the Director.

18.3 Environmentally Preferable Procurement Policy: The Environmentally Preferable Procurement Policy, along with a brief policy description, is located on the City's website at the following link: <https://www.sanjoseca.gov/your-government/environment/business-school-resources/for-schools/environmentally-preferable-procurement>. Environmental procurement policies and activities related to the completion of Consultant's work will include, whenever practicable, but are not limited to:

- ☐ The use of recycled and/or recyclable products in daily operations (i.e. 30%, 50%, 100% PCW paper, chlorine process free, triclosan free hand cleaner, etc.);
- ☐ The use of Energy-Star Compliant equipment;
- ☐ The use of alternative fuel and hybrid vehicles, and implementation of protocols aimed at increasing the efficiency of vehicle operation;
- ☐ The implementation of internal waste reduction and reuse protocol(s); and
- ☐ Water and resource conservation activities within facilities, including bans on individual serving bottled water and the use of compostable food service products.

19. TERMINATION

- 19.1 For Convenience:** The Director may terminate this Agreement at any time and for any reason by giving the Consultant written notice of the termination. The written notice must set forth the effective date of the termination, which must be at least 7 Business Days' after the date of the written notice.
- 19.2 For Cause:** The Director may terminate this Agreement immediately upon written notice for any material breach by the Consultant. If the Director terminates the Agreement for cause and obtains the same services from another consultant at a greater cost, the Consultant is responsible for such excess cost in addition to any other remedies available to the City.
- 19.3 Delivery of Work:** If the Director terminates the Agreement – whether for convenience or for cause – the Director has the option of requiring the Consultant to provide to the City any finished or unfinished Work Product prepared by the Consultant up to the date of Consultant's receipt of the written notice of termination.
- 19.4 Compensation:** The City will pay the Consultant the reasonable value of services satisfactorily rendered by the Consultant to the City up to the date of Consultant's receipt of the written notice of termination. For services to be "satisfactorily rendered," the Director must determine that the Consultant provided them in accordance with the terms and conditions of this Agreement. The Director will determine the reasonable value of satisfactorily rendered services based on the Compensation Table and any Schedule of Rates and Charges attached to this Agreement.

- 19.5 Receipt of Notice:** For purposes of this provision, the Consultant's receipt of the written notice of termination will be determined based on the date of actual receipt or based on Subsection 20.2 below, whichever occurs first.

20. NOTICES

- 20.1 Manner of Giving Notice:** All notices and other communications required by this Agreement must be in writing, and must be made via e-mail, personal service or United States mail, postage prepaid.
- 20.2 When Effective:** A notice or other communication that is e-mailed is effective when sent provided the sender receives an acknowledgement from the intended recipient (e.g. return receipt, return e-mail, or other written acknowledgement). A notice or other communication that is personally served is effective when personally delivered. A notice or other communication that is mailed is effective 3 calendar days after deposit in the United States mail.
- 20.3 To Whom Given:** All notices and other communications between the parties regarding the Agreement must be given to the individuals identified below using the appropriate contact information for giving notice:

To the City: City of San José
 Environmental Services Department
 Attn: Linden Skjeie
 200 E. Santa Clara St, 10th Floor
 San José, CA 95113
 (408) 975-2577
 linden.skjeie@sanjoseca.gov

To the Consultant: The Ecohero Show, LLC
 Attn: Brett Edwards
 2012 W. Alluvial Ave.
 Fresno, CA 93711
 (888) 482-3885
 ecoheroshow@gmail.com

- 20.4 Changing Contact Information:** Either party may change its contact information for receiving written notices and communications regarding the Agreement by providing notice of such change to the other party pursuant to this Section 20.

21. MISCELLANEOUS

- 21.1 Gifts Prohibited:** The Consultant represents that it is familiar with Chapter 12.08 of the San José Municipal Code, which generally prohibits a City officer or designated employee from accepting any gift. The Consultant shall not offer any City officer or designated employee any gift prohibited by Chapter 12.08. The Consultant's violation of this Subsection 21.1 is a material breach.
- 21.2 Disqualification of Former Employees:** The Consultant represents that it is familiar with Chapter 12.10 of the City's Municipal Code, which generally prohibits a former City officer and a former designated employee from providing services to the City connected with his/her former duties or official responsibilities. The Consultant shall not use either directly or indirectly any officer, employee or agent to perform any services if doing so would violate Chapter 12.10. The Consultant's violation of this Subsection 21.2 is a material breach.

- 21.3 **Waiver of a Violation:** The City's waiver of any violation of this Agreement by the Consultant is not a waiver of any other violation by the Consultant.
- 21.4 **Acceptance of Services Not a Waiver:** The City's acceptance of any service or deliverable is not a waiver or release of any professional duty of care applicable to such service or deliverable, or of any right of indemnification, any insurance requirements, or any other term or condition of this Agreement.
- 21.5 **Compliance with Laws:** The Consultant shall perform all services consistent with all applicable federal, state and local laws, ordinances, codes and regulations. This obligation is not limited in any way by the Consultant's obligation to comply with any specific law, ordinance, code or regulation set forth elsewhere in this Agreement.
- 21.6 **Business Tax:** The Consultant represents and warrants that it currently has a City business tax certificate or exemption, if qualified, and will maintain such certificate or exemption for the Agreement term.
- 21.7 **Assignability:** Except to the extent this Agreement authorizes the Consultant to use subconsultants, the Consultant shall not assign any part of this Agreement without the Director's prior written consent. The Director, at the Director's discretion, may void this Agreement if a violation of this provision occurs.
- 21.8 **Governing Law:** California law governs the construction and performance of this Agreement.
- 21.9 **Disputes:** Any litigation resulting from this Agreement will be filed and resolved by a federal or state court in California.
- 21.10 **Survival of Provisions:** If a court finds any part of this Agreement unenforceable, all other parts shall remain enforceable.
- 21.11 **Headings:** The section and exhibit headings are for convenience only and are not to be used in its construction.

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IN WITNESS WHEREOF, the City and Consultant have caused this Agreement to be executed by their respective duly authorized representatives as follows.

NOTE: The Consultant must make one of the following representations by placing its initials in the space provided. **The City will not process this Agreement unless the Consultant has initialed one of the provisions.**

_____ The Consultant certifies that the Consultant has a permanent place of business in California or is registered with the California Secretary of State to do business in California. The Consultant will file a California tax return and withhold on payments of California source income to nonresidents when required. If the Consultant ceases to have a permanent place of business in California or ceases to do any of the above, the Consultant will promptly notify the City at the address specified in Subsection 20.3 of this Agreement.

Or

_____ If the Consultant is unable to make the above certification, the Consultant acknowledges and agrees to provide the City with the applicable tax forms issued by the Internal Revenue Service and California Franchise Tax Board, as applicable, as specified in Section 10.8 of this Agreement.

City of San José

By



Email: sarah.zarate@sanjoseca.gov

Name: Sarah Zarate Date
Title: Director, Office of the City Manager

Consultant

By



Email: mreco@ecoheroshow.com

Name: Brett Edwards Date
Title: CEO

By



Email: sponsors@ecoheroshow.com

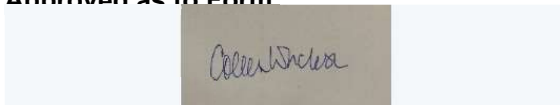
Name: Monique Figueiredo Date
Title: Sponsor Liaison

Approval as to Form (City Attorney):

Form Approved by the Office of the City Attorney

(Maximum Total Compensation is \$100,000 or less, and standard provisions of the form are not altered.)

Approved as to Form:



Email: colleen.winchester@sanjoseca.gov

Colleen Winchester Date
Sr. Deputy City Attorney

EXHIBIT A: SCOPE OF BASIC SERVICES

(Non-Capital Projects)

The Consultant shall provide services and deliverables as set forth in this **Exhibit A**. The Consultant shall provide all services and deliverables required by this **Exhibit A** to the satisfaction of the Director.

General Description of Project: Consultant will contact schools within the City of San José to schedule virtual school presentations and assemblies that discuss the topic of how to 'recycle right', will in its best efforts provide and deliver 1 presentation per City council district. Consultant will provide statistics and a final report to City's contract manager.

Task No. 1: Presentation and Curriculum Development

- A. Services:** Consultant will provide and deliver its EcoHero Show to school children in San Jose.
- B.** The show will be customized to focus on San Jose's priority messages to 'recycle right.' ("Recycle Right Presentation"). City will provide City-specific information to be covered and approve presentation prior to deployment. Presentation must include information and visuals about beverage container recycling. Presentation will be a minimum of 40 minutes. Presentation will be appropriate for school children in grades K-6. Presentation will be suitable for both in-person and virtual delivery at all-school assemblies and single-classroom settings, depending upon the preference of each school. Presentations will be given no later than May 31, 2022. Consultant will also provide its already created 'ecohero' curriculum that supplements and reinforces the presentation's recycle right messaging.

Consultant will conduct all outreach to schools with the outreach goal of performing, at least 1 per City Council District, to City schools. Priority will be for all-school assemblies except where schools request classroom presentations. City will provide a list of priority schools to reach out to. Presentations will be provided on a first-come first-serve basis and Consultant will establish a schools waiting list.

Consultant will provide City's contract manager with names and contact information for school contacts. City will be acknowledged as providing the funding for the presentations. City will provide a short (two-minute) video related to 'recycle right' to include at the conclusion of the Contractor's presentation. Once the presentations are done, Consultant will provide a final report, including but not limited to, the presentation content, outreach tactics, school contact information, number of students reached in what grades, and student and teacher feedback. Report will be in written form with main findings to be provided during a meeting with City's contract manager.

- B. Deliverable:** Depending upon school preferences, 40-minute presentations for K-6 school assemblies and Final Report electronically.
- C. Completion Time:** The Consultant must complete the services and deliverable for this task in accordance with whichever one of the following times is marked:

On or before the following date: May 31, 2022, for presentations, final Report is due by June 30.

On or before ____ Business Days from _____.

EXHIBIT B: COMPENSATION

Section 1 – Compensation Table

Part 1 – Compensation for Basic Services			
Column 1	Column 2	Column 3	Column 4
Task Nos.	Basis of Compensation	Invoice Period	Compensation
1	<input type="checkbox"/> Time & Materials <input checked="" type="checkbox"/> Fixed Fee	<input checked="" type="checkbox"/> Monthly <input type="checkbox"/> Completion of Task(s) <input type="checkbox"/> Completion of Work	\$650.00 upon creation of recycle right presentation \$850.00 each virtual whole school assembly \$1,050.00 each in person whole school assembly \$275.00 each virtual classroom presentation

			Expenses to comply with Exhibit D are reimbursable expenses.
Part 2 – Reimbursable Expenses			
<input checked="" type="checkbox"/> No expenses are separately reimbursable. The amount(s) in Column 4 of Part 1 include(s) payment for all expenses.	<input type="checkbox"/> Expenses are separately reimbursable in accordance with Subsection 10.5 of this Agreement. The maximum amount of reimbursable expenses is:		\$
Part 3 – Subconsultant Costs			
<input checked="" type="checkbox"/> Subconsultant costs are not separately compensable. The amount(s) in Column 4 of Part 1 include(s) payment for subconsultants.	<input type="checkbox"/> Subconsultant costs are separately compensable in accordance with Subsection 10.6 of this Agreement. The maximum amount of compensation for subconsultant costs is:		\$
Part 4 – Additional Services			
<input checked="" type="checkbox"/> No money is budgeted for Additional Services, and the Director can not authorize any Additional Services.	<input type="checkbox"/> The Director may authorize the Consultant to perform Additional Services up to the following maximum amount:		\$
Maximum Total Compensation (sum of Parts 1 through 4):			\$10,000.00

Section 2 – Schedule of Rates and Charges

Omitted. No Schedule of Rates and Charges is included because the City will not be compensating the Consultant for any Basic Services on a “time & materials” basis.

The following is the Schedule of Rates and Charges applicable to this Agreement:

EXHIBIT C: INSURANCE REQUIREMENTS

Consultant, at Consultant's sole cost and expense, shall procure and maintain for the duration of this Agreement insurance against claims for injuries to persons or damages to property which may arise from, or in connection with, the performance of the services hereunder by Consultant, its agents, representatives, employees or subcontractors.

A. Minimum Scope of Insurance

Coverage shall be at least as broad as:

1. The coverage provided by Insurance Services Office Commercial General Liability coverage ("occurrence") Form Number CG 0001; and
2. The coverage provided by Insurance Services Office Form Number CA 0001 covering Automobile Liability. Coverage shall be included for all owned, non-owned and hired automobiles; and
3. Workers' Compensation insurance as required by the California Labor Code and Employers Liability insurance.

There shall be no endorsement reducing the scope of coverage required above unless approved by the City's Risk Manager.

B. Minimum Limits of Insurance

Consultant shall maintain limits no less than:

1. Commercial General Liability: \$1,000,000 per occurrence for bodily injury, personal injury and property damage. If Commercial Liability Insurance or other form with a general aggregate limit is used, either the general aggregate limit shall apply separately to this project/location or the general aggregate limit shall be twice the required occurrence limit; and
2. Automobile Liability: \$1,000,000 combined single limit per accident for bodily injury and property damage; and
3. Workers' Compensation and Employers Liability: Workers' Compensation limits as required by the California Labor Code and Employers Liability limits of \$1,000,000 per accident.

Any limits requirement may be met with any combination of primary and excess coverage so long as the excess coverage is written on a "follow form" or umbrella basis.

C. Deductibles and Self-Insured Retentions

Any deductibles or self-insured retentions must be declared to, and approved by City's Risk Manager.

D. Other Insurance Provisions

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

1. Commercial General Liability and Automobile Liability Coverages

- a. The City of San José, its officers, employees and agents are to be covered as additional insureds as respects: Liability arising out of activities performed by or on behalf of, Consultant; products and completed operations of Consultant; premises owned, leased or used by Consultant; and automobiles owned, leased, hired or borrowed by Consultant. The coverage shall contain no special limitations on the scope of protection afforded to City, its officers, employees, and agents.
- b. Consultant's insurance coverage shall be primary insurance as respects City, its officers, employees, and agents. Any insurance or self-insurance maintained by City, its officers, employees, or agents shall be excess of Consultant's insurance and shall not contribute with it.
- c. Any failure to comply with reporting provisions of the policies by Consultant shall not affect coverage provided City, its officers, employees, or agents.
- d. Coverage shall state that Consultant's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability.
- e. Coverage shall contain a waiver of subrogation in favor of the City, its officers, employees, and agents.

2. Workers' Compensation and Employers' Liability

Coverage shall contain waiver of subrogation in favor of the City of San José, its officers, employees, and agents.

3. All Coverages

Each insurance policy required by this Agreement shall be endorsed to state that coverage shall not be suspended, voided, cancelled, or reduced in limits except after thirty (30) days' prior written notice has been given to City, except that ten (10) days' prior written notice shall apply in the event of cancellation for nonpayment of premium.

E. Acceptability of Insurers

Insurance is to be placed with insurers acceptable to City's Risk Manager.

F. Verification of Coverage

Consultant shall furnish City with certificates of insurance and endorsements affecting coverage required by this Agreement. 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.

Proof of insurance shall be emailed in pdf format to: Riskmgmt@sanjoseca.gov:

Certificate Holder
City of San José—Finance
Risk Management & Insurance
200 East Santa Clara Street, 14th Floor Tower
San José, CA 95113-1905

G. Subcontractors

Consultant shall include all subcontractors as insureds under its policies or shall obtain separate certificates and endorsements for each subcontractor.

EXHIBIT D: EMPLOYEE/VOLUNTEER CLEARANCE VERIFICATION AND COMPLIANCE WITH THE CHILD ABUSE AND NEGLECT REPORTING ACT

If GRANTEE provides services involving minors, and as a CITY-approved method of complying with the provisions contained in this AGREEMENT, GRANTEE shall conduct a criminal background check through the database of the California Department of Justice **and** an FBI criminal database or equivalent national database.

GRANTEE shall also comply with the provisions of the Child Abuse and Neglect Reporting Act, California Penal Code Section [11164 et. seq.](#) Additionally, GRANTEE certifies the following:

1. Any and all personnel employed or retained by GRANTEE in conducting the operations of GRANTEE's program shall be qualified to perform the duties assigned to them by GRANTEE. GRANTEE agrees that GRANTEE shall not at any time allow its employees or volunteers to be in any position with supervisory or disciplinary authority over minors, if they have been convicted of any offense identified in California Public Resources Code Section 5164. (Copy attached.)

CITY and GRANTEE understand that results of background checks on minors may be confidential under state law. Therefore, all employees or volunteers must be at least 18 years of age if they are to be in a position having supervisory or disciplinary authority over any minor.

If GRANTEE intends to have employees or volunteers under the age of 18 providing services under this AGREEMENT, GRANTEE shall maintain and make available to CITY, if requested, guidelines, procedures or policies, that safeguard and ensure that no employees or volunteers under the age of 18 will be providing services under this AGREEMENT unsupervised and further GRANTEE shall ensure that none of its employees or volunteers under 18 years of age have any supervisory or disciplinary authority over any minor, as such term is used in California Public Resources Code Section 5164.

2. GRANTEE shall be responsible for ensuring that no person who has supervisory or disciplinary authority over minors, who is paid or unpaid by GRANTEE, shall be permitted to provide services unless appropriate background checks, including fingerprints, have been performed prior to the beginning of services under this AGREEMENT, and the person meets the standards set forth above. If requested by CITY, and to the extent allowed by law, GRANTEE shall promptly provide documentation listing each person that has provided or is providing services hereunder involving supervision or disciplinary authority over minors, and certifying that the GRANTEE has conducted the proper background check on such person or persons, and each of the named persons is legally permitted to perform the services described in this AGREEMENT. Regardless of whether such documentation is requested or delivered by GRANTEE, GRANTEE shall be solely responsible for compliance with the provisions of this Section.
3. That no person paid or unpaid by GRANTEE shall be permitted to provide services requiring contact with children or providing food concessionaire services or other licensed concessionaire services in that area, unless GRANTEE has complied with the TB testing requirements set forth in Section 5163 of the California Public Resources Code (copy attached), verifying that the person or persons has provided evidence/verification of a negative TB skin test reading less than two (2) years old (if newly hired) or within four (4) years (if current employee) of the date of execution of this AGREEMENT and every four (4) years thereafter, if the term of this AGREEMENT exceeds four (4) years.

For persons with a positive TB skin test reading, a physician's medical clearance must be obtained prior to services being provided as specified above. GRANTEE shall keep on file each "Certificate" of clearance for the persons described above, and shall also make available a copy of each Certificate to CITY, if requested and allowed by law. "Certificate" means a document signed by a licensed examining physician and surgeon or a notice from a public health agency or unit of the tuberculosis association which indicates freedom from active tuberculosis.

4. GRANTEE understands that if services are rendered on a school site, there may be additional requirements that may apply including without limitation, requirements under the California Education Code. GRANTEE, acknowledges that it is GRANTEE's sole responsibility to comply with all applicable laws, regulations and licensing requirements in GRANTEE's provision of services hereunder.

I, the GRANTEE by signing below verify that I have read and agree to the above:

Brett Edwards

Email: mreco@ecoheroshow.com

Signature/Title

Date

CALIFORNIA PUBLIC RESOURCES CODE SECTION 5164

§ 5164. Persons convicted of certain offenses not to be hired for employment or as volunteer in positions with supervisory authority over minors; Criminal background screening; Fees

(a) (1) A county, city, city and county, or special district shall not hire a person for employment, or hire a volunteer to perform services, at a county, city, city and county, or special district operated park, playground, recreational center, or beach used for recreational purposes, in a position having supervisory or disciplinary authority over a minor, if that person has been convicted of an offense specified in paragraph (2).

(2) (A) A violation or attempted violation of Section 220, 261.5, 262, 273a, 273d, or 273.5 of the Penal Code, or a sex offense listed in Section 290 of the Penal Code, except for the offense specified in subdivision (d) of Section 243.4 of the Penal Code.

(B) A felony or misdemeanor conviction specified in subparagraph (C) within 10 years of the date of the employer's request.

(C) A felony conviction that is over 10 years old, if the subject of the request was incarcerated within 10 years of the employer's request, for a violation or attempted violation of an offense specified in Chapter 3 (commencing with Section 207) of Title 8 of Part 1 of the Penal Code, Section 211 or 215 of the Penal Code, wherein it is charged and proved that the defendant personally used a deadly or dangerous weapon, as provided in subdivision (b) of Section 12022 of the Penal Code, in the commission of that offense, Section 217.1 of the Penal Code, Section 236 of the Penal Code, an offense specified in Chapter 9 (commencing with Section 240) of Title 8 of Part 1 of the Penal Code, or an offense specified in subdivision (c) of Section 667.5 of the Penal Code, provided that a record of a misdemeanor conviction shall not be transmitted to the requester unless the subject of the request has a total of three or more misdemeanor convictions, or a combined total of three or more misdemeanor and felony convictions, for violations listed in this section within the 10-year period immediately preceding the employer's request or has been incarcerated for any of those convictions within the preceding 10 years.

(b) (1) To give effect to this section, a county, city, city and county, or special district shall require each such prospective employee or volunteer to complete an application that inquires as to whether or not that individual has been convicted of an offense specified in subdivision (a). The county, city, city and county, or special district shall screen, pursuant to Section 11105.3 of the Penal Code, any such prospective employee or volunteer, having supervisory or disciplinary authority over a minor, for that person's criminal background.

(2) A local agency request for Department of Justice records pursuant to this subdivision shall include the prospective employee's or volunteer's fingerprints, which may be taken by the local agency, and any other data specified by the Department of Justice. The request shall be made on a form approved by the Department of Justice. A fee shall not be charged to the local agency for requesting the records of a prospective volunteer pursuant to this subdivision.

(3) A county, city, city and county, or special district may charge a prospective employee or volunteer described in subdivision (a) a fee to cover all of the county, city, city and county, or special district's costs attributable to the requirements imposed by this section.

CALIFORNIA PUBLIC RESOURCES CODE SECTION 5163

§ 5163. Certificate showing freedom from communicable tuberculosis as condition of employment

(a) No person shall initially be employed in connection with a park, playground, recreational center, or beach used for recreational purposes by a city or county in a position requiring contact with children, or as a food concessionaire or other licensed concessionaire in that area, unless the person produces or has on file with the city or county a certificate showing that within the last two years the person has been examined and has been found to be free of communicable tuberculosis.

(b) Thereafter, those employees who are skin test negative shall be required to undergo the foregoing examination at least once each four years for so long as the employee remains skin test negative. Once an employee has a documented positive skin test which has been followed by an X-ray, the foregoing examination is no longer required and a referral shall be made within 30 days of the examination to the local health officer to determine the need for followup care.

"Certificate" means a document signed by the examining physician and surgeon who is licensed under Chapter 5 (commencing with Section 2000) of Division 2 of the Business and Professions Code, or a notice from a public health agency or unit of the tuberculosis association which indicates freedom from active tuberculosis.

§ 5163.1. Tuberculosis examination

The examination shall consist of an approved intradermal tuberculosis test, which, if positive, shall be followed by an X-ray of the lungs.

Nothing in Sections 5163 to 5163.2, inclusive, shall prevent the governing body of any city or county, upon recommendation of the local health officer, from establishing a rule requiring a more extensive or more frequent examination than required by Section 5163 and this section.

§ 5163.2. Technician taking X-ray film; Interpretation of X-ray

The X-ray film may be taken by a competent and qualified X-ray technician if the X-ray film is subsequently interpreted by a licensed physician and surgeon.

§ 5163.3. Files kept of certificates

The city or county shall maintain a file containing an up-to-date certificate for each person covered by Section 5163.

§ 5163.4. Requiring more extensive or more frequent examinations

Nothing in Sections 5163 to 5163.3, inclusive, shall prevent the city or county from requiring more extensive or more frequent examinations.