

## PROFESSIONAL SERVICES AGREEMENT

THIS AGREEMENT is made this 11th day of June 2019, by the CITY OF GARDEN GROVE, a municipal corporation, ("CITY"), and SIEMENS INDUSTRY, INC., a Delaware Corporation ("CONSULTANT").

### RECITALS

The following recitals are a substantive part of this Agreement:

1. This Agreement is entered into pursuant to City Council authorization dated June 11, 2019.
2. CITY desires to utilize the services of CONSULTANT to provide **an investment grade audit (the "Audit") to develop a facility improvement project to improve City's infrastructure and operations efficiencies.**
3. CITY does not have the personnel to accomplish said services.
4. CONSULTANT is qualified by virtue of experience, training, education and expertise to accomplish the required services.

### AGREEMENT

#### THE PARTIES MUTUALLY AGREE AS FOLLOWS:

1. **Term of Agreement:**

This Agreement shall cover services rendered from date of this Agreement until the services to be provided are completed or unless sooner terminated per Subsection 3.5.

2. **Services to be Provided:** The services to be performed by CONSULTANT shall consist of the tasks specified in CONSULTANT's Letter of intent, which is attached hereto as Exhibit "A" and incorporated herein by reference. The Letter of Intent ("LOI") and this Agreement do not guarantee any specific amount of work. CONSULTANT warrants that all services will be performed in a competent, professional and satisfactory manner in accordance with customary and usual practices in CONSULTANT'S profession and the standards prevalent in the industry for such services. By executing this Agreement, CONSULTANT warrants that it has carefully considered how the work should be performed and fully understands the facilities, difficulties, and restrictions attending performance of the work under this Agreement.

3. **CITY'S Responsibilities**

In order to accomplish the Audit, the CITY shall provide CONSULTANT with the following information (if not already provided) and assistance: copies of utility bills (electric, gas, water, etc.) for the past two (2) years; maintenance and operational costs for the systems within the scope of the Audit; budgeted capital and operational expenses for 5 years; a full

set of architectural and engineering drawings as available/requested; audited financial statements for the past three (3) years; a point of contract for the Audit team; and access to all the sites where the Audit is to be performed.

3. **Compensation.** CONSULTANT shall be compensated as follows:

3.1 The terms "PPA Proposal", "PCA Proposal," "Criteria" and "Objectives" are defined in the LOI.

3.2 The costs of the Audit are in the amount of \$70,000.00 (the "Audit Fee"). If the PPA Proposal provided by CONSULTANT fails to meet the Criteria, or the PCA Proposal provided by CONSULTANT fails to meet the Objectives, then CONSULTANT shall receive no payment for the Audit.

3.3 If the PPA Proposal meets the Criteria and the PCA Proposal meets the Objectives, but the parties fail to enter into a PCA and a PPA within 30 days of CONSULTANT'S delivery of the PPA and PCA Proposals, then the CITY shall pay CONSULTANT the Audit Fee within thirty (30) days of receipt of CONSULTANT'S invoice.

3.4 Alternatively, if the PPA Proposal meets the Criteria and the PCA Proposal meets the Objectives, and the parties execute a PPA and a PCA, then the Audit Fee will be included in the calculation of the PPA rate under the PPA and the price under the PCA.

3.5 Termination. CITY and CONSULTANT shall each have the right to terminate this Agreement, without cause, by giving thirty (30) days written notice of termination to the other party. If the Agreement is terminated by CITY before the delivery of the PCA and PPA Proposals, the CITY will compensate CONSULTANT for reasonable costs and expenses incurred to date not to exceed the Audit Fee. CONSULTANT is required to present evidence to support such costs and expenses. If the Agreement is terminated by CONSULTANT, then CONSULTANT shall not be entitled to any compensation for its work under this Agreement.

4. **Insurance Requirements**

4.1 Commencement of Work. CONSULTANT shall not commence work under this Agreement until all certificates and endorsements have been received and approved by the CITY. All insurance required by this Agreement shall contain a Statement of Obligation on the part of the carrier to notify the CITY of any material change, cancellation, or termination at least thirty (30) days in advance.

4.2 Workers Compensation Insurance. For the duration of this Agreement, CONSULTANT and all subcontractors shall maintain Workers Compensation Insurance in the amount and type required by law, if applicable. The insurer shall waive its rights of subrogation against the CITY, its officers, officials, agents, employees, and volunteers.

4.3 Insurance Amounts. CONSULTANT shall maintain the following insurance for the duration of this Agreement:

- a) Commercial general liability in an amount not less than \$1,000,000 per occurrence; (claims made and modified occurrence policies are not acceptable); Insurance companies must be approved by the CITY, admitted and licensed in California, and have a Best's Guide Rating of A-, Class VII or better, as approved by the CITY;
- b) Automobile liability in an amount not less than of \$1,000,000 per occurrence; (claims made and modified occurrence policies are not acceptable); Insurance companies must be approved by the CITY, admitted and licensed in California, and have a Best's Guide Rating of A-, Class VII or better, as approved by the CITY.
- c) Professional liability in an amount not less than \$1,000,000 per occurrence; Insurance companies must be acceptable to CITY and have an AM Best's Guide Rating of A-, Class VII or better, as approved by the CITY. If the policy is written on a "claims made" basis, the policy shall be continued in full force and effect at all times during the term of the Agreement, and for a period of three (3) years from the date of the completion of services provided. In the event of termination, cancellation, or material change in the policy, CONSULTANT shall obtain continuing insurance coverage for the prior acts or omissions of CONSULTANT during the course of performing services under the term of the agreement. The coverage shall be evidenced by either a new policy evidencing no gap in coverage, or by obtaining separate extended "tail" coverage with the present or new carrier.

4.4 An Additional Insured Endorsement, ongoing and completed operations, for the policy under section 4.3 (a) shall designate CITY, its officers, officials, employees, agents, and volunteers as additional insureds for liability arising out of work or operations performed by or on behalf of the CONSULTANT. CONSULTANT shall provide to CITY proof of insurance and endorsement forms that conform to CITY's requirements, as approved by the CITY.

4.5 An Additional Insured Endorsement for the policy under section 4.3 (b) shall designate CITY, its officers, officials, employees, agents, and volunteers as additional insureds for automobiles owned, lease, hired, or borrowed by CONSULTANT. CONSULTANT shall provide to CITY proof of insurance and endorsement forms that conform to CITY's requirements, as approved by the CITY.

4.6 For any claims related to this Agreement, CONSULTANT's insurance coverage shall be primary insurance as respects to CITY, its officers, officials, employees, agents, and volunteers. Any insurance or self-insurance maintained by the CITY, its officers, officials, employees, agents, or volunteers shall be excess of the CONSULTANT's insurance and shall not contribute with it.

4.7 *If CONSULTANT maintains higher insurance limits than the minimums shown above, CONSULTANT shall provide coverage for the higher insurance limits otherwise maintained by the CONSULTANT.*

5. **Non-Liability of Officials and Employees of the CITY.** No official or employee of CITY shall be personally liable to CONSULTANT in the event of any default or breach by CITY, or for any amount, which may become due to CONSULTANT.

6. **Non-Discrimination.** CONSULTANT covenants there shall be no discrimination against any person or group due to race, color, creed, religion, sex, marital status, age, handicap, national origin or ancestry, in any activity pursuant to this Agreement.

7. **Independent Contractor.** It is agreed to that CONSULTANT shall act and be an independent contractor and not an agent or employee of CITY and shall obtain no rights to any benefits which accrue to CITY'S employees.

8. **Compliance With Law.** CONSULTANT shall comply with all applicable laws, ordinances, codes and regulations of the federal, state and local government. CONSULTANT shall comply with, and shall be responsible for causing all contractors and subcontractors performing any of the work pursuant to this Agreement to comply with, all applicable federal and state labor standards, including, to the extent applicable, the prevailing wage requirements promulgated by the Director of Industrial Relations of the State of California Department of Labor. The City makes no warranty or representation concerning whether any of the work performed pursuant to this Agreement constitutes public works subject to the prevailing wage requirements.

9. **Disclosure of Documents.** All documents or other information developed or received by CONSULTANT are confidential and shall not be disclosed without authorization by CITY, unless disclosure is required by law.

10. **Ownership of Work Product.** All reports and other documents that are specifically prepared by CONSULTANT under this Agreement (the "Deliverables") shall become the CITY'S property upon the CITY'S execution of the PCA and PPA documents or upon the CITY'S payment of the Audit Fee whichever is earlier. Any reuse of the Deliverables for other projects, or use other than by the CITY will be at the CITY'S or such user's sole risk and without liability to SIEMENS.

11. **Intellectual Property.** Notwithstanding the foregoing, the CITY shall not, by virtue of this Agreement, acquire any ownership interest in any formulas, patterns, devices, secret inventions or processes, copyrights, patents, other intellectual proprietary rights, or similar items of property which are owned by CONSULTANT, any of CONSULTANT'S subcontractors, or by any of CONSULTANT'S sub-consultants, whether or not they are used in connection with the work provided under this Agreement.

12. **Conflict of Interest and Reporting.** CONSULTANT shall at all times avoid conflict of interest or appearance of conflict of interest in performance of this Agreement.

13. **Notices.** All notices shall be personally delivered or mailed to the below listed addresses, or to such other addresses as may be designated by written notice. These addresses shall be used for delivery of service of process.

Address of CONSULTANT is as follows:

Siemens Industry, Inc.  
Smart Infrastructure 6141 Katella Avenue  
Cypress, CA 90630  
Attn: Ernest Kim

Address of CITY is as follows (with a copy to):  
Scott C. Stiles City Manager  
City of Garden Grove  
11222 Acacia Parkway  
Garden Grove, CA 92840

City Attorney  
City of Garden Grove  
P.O. Box 3070  
Garden Grove, CA 92840

14. **CONSULTANT'S Proposal.** This Agreement shall include CONSULTANT'S LOI, Exhibit "A" hereto, which shall be incorporated herein. In the event of any inconsistency between the terms of the LOI and this Agreement, this Agreement shall govern.

15. **Licenses, Permits and Fees.** At its sole expense, CONSULTANT shall obtain a Garden Grove Business License, all permits and licenses as may be required by this Agreement.

16. **Familiarity With Work.** By executing this Agreement, CONSULTANT warrants that: (1) it has investigated the work to be performed; (2) it has investigated the site of the work and is aware of all conditions there; and (3) it understands the facilities, difficulties and restrictions of the work under this Agreement. Should CONSULTANT discover any latent or unknown conditions materially differing from those inherent in the work or as represented by CITY, it shall immediately inform CITY of this and shall not proceed, except at CONSULTANT'S risk, until written instructions are received from CITY.

17. **Time of Essence.** Time is of the essence in the performance of this Agreement.

18. **Limitations Upon Subcontracting and Assignment.** The experience, knowledge, capability and reputation of CONSULTANT, its principals and employees were a substantial inducement for CITY to enter into this Agreement. CONSULTANT shall not contract with any other entity to perform the services required without written approval of the CITY. This Agreement may not be assigned voluntarily or by operation of law, without the prior written approval of CITY. If CONSULTANT is permitted to subcontract any part of this Agreement, CONSULTANT shall be responsible to CITY for the acts and omissions of its subcontractor as it is for persons directly employed. Nothing contained in this Agreement shall create any contractual relationship between any subcontractor and CITY. CITY will deal directly with and will make all payments to CONSULTANT.

19. **Authority to Execute.** The persons executing this Agreement on behalf of the

parties warrant that they are duly authorized to execute this Agreement and that by executing this Agreement, the parties are formally bound.

20. **Indemnification.** To the fullest extent permitted by law, CONSULTANT agrees to protect, defend, and hold harmless CITY and its elective or appointive boards, officers, agents, and employees from any and all claims, liabilities, expenses, or damages of any nature, including attorneys' fees, for injury or death of any person, or damages of any nature, including interference with use of property, to the extent caused by the negligence, recklessness and/or intentional wrongful conduct of CONSULTANT, CONSULTANT'S agents, officers, employees, subcontractors, or independent contractors hired by CONSULTANT in the performance of the Agreement.

This hold harmless agreement shall apply to all liability regardless of whether any insurance policies are applicable. The policy limits do not act as a limitation upon the amount of indemnification to be provided by CONSULTANT.

21. ANYTHING HEREIN NOTWITHSTANDING, IN NO EVENT SHALL EITHER CITY OR CONSULTANT BE LIABLE TO THE OTHER PARTY FOR SPECIAL, INDIRECT, INCIDENTAL OR CONSEQUENTIAL DAMAGES, INCLUDING COMMERCIAL LOSS, LOSS OF USE, OR LOST PROFITS, EVEN IF EITHER PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES AND, IN ANY EVENT, CONSULTANT'S AGGREGATE LIABILITY FOR ANY AND ALL CLAIMS, LOSSES OR EXPENSES ARISING OUT OF THIS AGREEMENT, OR OUT OF ANY DELIVERABLES FURNISHED UNDER THIS AGREEMENT, WHETHER BASED IN CONTRACT, NEGLIGENCE, STRICT LIABILITY, AGENCY, WARRANTY, TRESPASS, INDEMNITY OR ANY OTHER THEORY OF LIABILITY, SHALL BE LIMITED TO THE LESSER OF \$1,000,000 OR THE TOTAL COMPENSATION RECEIVED BY CONSULTANT FROM CITY UNDER THIS AGREEMENT, PROVIDED, HOWEVER THAT THE FOREGOING LIMITATION SHALL NOT APPLY TO CONSULTANT'S OBLIGATIONS TO DEFEND AND INDEMNIFY CITY FOR PERSONAL INJURY, WRONGFUL DEATH OR DAMAGE TO TANGIBLE PROPERTY.

22. **Modification.** This Agreement constitutes the entire agreement between the parties and supersedes any previous agreements, oral or written. This Agreement may be modified only by subsequent mutual written agreement executed by CITY and CONSULTANT.

23. **Waiver.** All waivers of the provisions of this Agreement must be in writing by the appropriate authorities of the CITY and CONSULTANT.

24. **California Law.** This Agreement shall be construed in accordance with the laws of the State of California. Any action commenced about this Agreement shall be filed in the central branch of the Orange County Superior Court or in the federal district court for the Central District of California.

25. **Interpretation.** This Agreement shall be interpreted as though prepared by both parties

26. **Preservation of Agreement.** Should any provision of this Agreement be found invalid or unenforceable, the decision shall affect only the provision interpreted, and all

remaining provisions shall remain enforceable.

27. **Appropriations.** This Agreement is subject to and contingent upon funds being appropriated therefor by the Garden Grove City Council for each fiscal year covered by the term of this Agreement. If such appropriations are not made, this Agreement shall automatically terminate without penalty to the CITY.

*[SIGNATURES ON FOLLOWING PAGE]*

IN WITNESS THEREOF, these parties hereto have caused this Agreement to be executed as of the date set forth opposite the respective signatures.

"CITY"  
CITY OF GARDEN GROVE

By: \_\_\_\_\_  
City Manager Dated

ATTEST:

"CONSULTANT"  
SIEMENS INDUSTRY, INC.

\_\_\_\_\_  
City Clerk Dated

By: *Russell DeNapoli*  
Title: Service FBA  
Date: 6/5/19

Tax I.D.: 13-2762488

APPROVED AS TO FORM:

If CONSULTANT/CONTRACTOR is a corporation, a Corporate Resolution and/or Corporate Seal is required. If a partnership, Statement of Partnership must be submitted to CITY

\_\_\_\_\_  
City Attorney  
Date: \_\_\_\_\_

Digitally signed by Noe G. Bermudez  
DN: cn=Noe G. Bermudez, o=City of Garden Grove, ou=City of Garden Grove, email=Noe.G.Bermudez@cityofgarden Grove.com, c=US  
Approved By: \_\_\_\_\_  
NAME: *Noe G. Bermudez*  
TITLE: Noe G. Bermudez  
DATE: Assistant Secretary





## EXHIBIT A

TO BE PRINTED ON THE CITY'S LETTERHEAD

June 11, 2019  
 Siemens Industry, Inc.  
 Smart Infrastructure  
 Attention: Ernest Kim  
 6141 Katella Ave.  
 Cypress, CA 90630

Re: Letter of Intent and Approval To Proceed with Investment Grade Audit

Dear Mr. Kim,

This document is to serve as a Letter of Intent (the "LOI") between Siemens Industry, Inc. ("Siemens") and the City of Garden Grove (the "City"). The City intends to implement a project to improve its infrastructure and its operational efficiencies (the "Project"). The Project will be comprised of a variety of facility improvement measures ("FIMs") to be assessed through an investment grade audit (the "Audit").

The Audit will include the FIMs listed in the Table below at the locations listed in the Table

FIM	Location
<b>Interior/ Exterior Lighting</b>	All Reservoirs and Wells 27, 19, 25, 26, 29,30
<b>Package Unit Replacement</b>	Trask Reservoir, West Garden Grove Reservoir, Well 30, West Haven
<b>Siemens Controls</b>	Trask Reservoir, West Haven Reservoir, West Garden Grove Reservoir, Well 27, 30
<b>Roof Mount Solar</b>	Lampson Reservoir
<b>Battery Storage</b>	Lampson Reservoir
<b>Pumps/Motors</b>	Lampson, Trask, West Haven

The Audit will evaluate opportunities to reduce utility and operating costs, procure energy at lower costs and use alternative sources of energy. The following systems will be evaluated: HVAC, Building Controls, Lighting, Pumps/Motors, Solar at Lampson sites and Battery Storage. Siemens has performed a Preliminary Feasibility Study and has determined that the potential cost savings, including operating and utility cost reduction, are in the amount of \$ 100,000.00 per year +/- 20.00%.

The City and Siemens will cooperate to finalize the technical, contractual and financial components of the Project, and the City will pursue financing, possibly with assistance from Siemens.

Siemens and the City jointly commit to provide the necessary resources and information in order to meet the following Project development schedule:

Milestone	Target Completion Date
30% Meeting (SOW Review)	July 3, 2019
60% Meeting (M&V Review)	August 1, 2019
90% Meeting (IGA Presentation)	August 29, 2019
Board Workshop (Optional)	September 3, 2019
Board Approval	September 24, 2019
Execution of Agreement	September 26, 2019

Siemens' ability to achieve the schedule set forth above is dependent on the City promptly providing to Siemens all of the information described in this LOI.

As set forth above, the FIMs that will be assessed during the Audit include a solar photovoltaic and battery storage system (collectively, the "System") at the Lampson sites. With regard to the System, the City has not yet determined whether it wishes to: (i) enter into a Power Purchase Agreement ("PPA") whereby Siemens will own the System, and where the City will be obligated to purchase all the power generated by the System; or (ii) enter into performance contracting agreement ("PCA") whereby the

City will own all the new equipment to implement the FIMs, including the System. This LOI describes the deliverables, and the payment terms of the Siemens' Audit costs in the event the City chooses to contract for the System under a PPA and the rest of the FIMs within the scope of the Audit under a PCA. If the City chooses to contract with Siemens for all the FIMs, including but not limited to the System, under a PCA, the parties will enter into an amendment to the Professional Services Agreement on this LOI to reflect this arrangement. The City shall advise Siemens in writing, no later than within 60 days of the execution of this LOI, of the option that it chooses.

**The PPA Proposal**

The scope of the Audit will include a detailed energy and site study necessary to provide the City with a proposal for a PPA that will include details for the design, engineering and installation of the System at the Lampson sites (the "PPA Proposal"). Within 30 days of the City advising Siemens that it is choosing to contract for the Systems under a PPA, Siemens will submit a PPA Proposal that will meet the following criteria (the "Criteria"):

1. The PPA rate shall be within \$0.14/kWh +/- 15% for solar only OR \$0,16kWh+/-15% for solar and battery storage.
2. The total Project term for the PPA shall be 20 years.
3. The total system size of 380 kW +/- 30%

**The PCA Proposal**

With regard to the FIMs other than the System, the purpose of the Audit will be to evaluate the feasibility of meeting the following Project objectives (the "Objectives");

- a. The total Project costs, including financing costs, shall not exceed \$3,000,000.
- b. The total Project costs, including financing, shall be offset by the total cost savings, including operating and utility savings, over a period not to exceed 17 years;
- c. Siemens will provide a written guarantee of the Project's utility savings and reduced operational costs.

Siemens will use the Audit as the basis for a draft of a PCA (the "PCA Proposal") and will submit the PCA Proposal to the City together with the PPA Proposal described above.

On behalf of the City, this Letter of Intent is approved as of the date above.

Sincerely,

\_\_\_\_\_  
Signed

\_\_\_\_\_  
Print Name

\_\_\_\_\_  
Title