

AGREEMENT NO. ____

AGREEMENT BETWEEN
THE CITY OF LOS ANGELES AND
JOHNSON MATTHEY, INC.

THIS AGREEMENT ("Agreement") is made and entered into by and between the CITY OF LOS ANGELES, a municipal corporation ("City"), acting by and through its Board of Harbor Commissioners ("Board") and Johnson Matthey, Inc., a Pennsylvania corporation, 400 Lapp Road, Suite 200, Malvern, PA 19355, Stationary Emissions Control division ("Subrecipient").

WHEREAS, City of Los Angeles Harbor Department ("Harbor Department") applied for and was awarded a grant of funds under the Air Quality Improvement Program (AQIP), Assembly Bill (AB) 118, Advanced Technology Demonstration Project Solicitation; and

WHEREAS, Harbor Department entered into a Project Grant Agreement No. G09-AWIP-13 ("Grant") with the California Air Resources Board ("ARB") a copy of which is attached and incorporated hereto as Exhibit A; and

WHEREAS, the Grant provides funding under the AQIP AB 118 Advanced Technology Demonstration Project to the Harbor Department to demonstrate advanced aftertreatment devices on existing locomotive engines operating at the San Pedro Bay Ports; and

WHEREAS, the Tier IV PM Retrofit System for a 2,100 hp Genset Switch Locomotive Project, proposed by Subrecipient, was included in the Harbor Department's application to the AQIP AB 118 Advanced Technology Demonstration Project Solicitation and was eligible for funding under the Grant, and this system is expected to reduce particulate matter (PM) emissions by greater than 85% plus additional carbon monoxide (CO) and hydrocarbon (HC) benefits.

NOW, THEREFORE, IT IS MUTUALLY AGREED AS FOLLOWS:

I. SERVICES TO BE PERFORMED BY SUBRECIPIENT

A. Subrecipient hereby agrees to render to City, as an independent contractor, certain professional, technical and expert services of a temporary and occasional character as set forth in Exhibit B ("Scope of Work").

B. Subrecipient, at its sole cost and expense, shall furnish all services, materials, equipment, subsistence, transportation and all other items necessary to perform the Scope of Work. As between City and Subrecipient, each party shall be responsible for any taxes or fees which may be assessed against that party or its employees by laws of any duly constituted taxing authority with jurisdiction resulting

from performance of the Scope of Work, whether social security, payroll or other, and regardless of whether assessed by the federal government, any state, the City, or any other governmental entity.

C. Subrecipient acknowledges and agrees that it lacks authority to perform any services outside the Scope of Work. Subrecipient further acknowledges and agrees that any services it performs outside the Scope of Work are performed as a volunteer and shall not be compensable under this Agreement.

D. The Scope of Work shall be performed by personnel qualified and competent in the sole reasonable discretion of the Executive Director or his or her designee ("Executive Director"), whether performance is undertaken by Subrecipient or third-parties with whom Subrecipient has contracted ("Subcontractors"). Obligations of this Agreement, whether undertaken by Subrecipient or Subcontractors, are and shall be the responsibility of Subrecipient. Subrecipient acknowledges and agrees that this Agreement creates no rights in Subcontractors with respect to City and that obligations that may be owed to Subcontractors, including, but not limited to, the obligation to pay Subcontractors for services performed, are those of Subrecipient alone. Upon Executive Director's written request, Subrecipient shall supply City's Harbor Department ("Department") with all agreements between it and its Subcontractors.

II. SERVICES TO BE PERFORMED BY CITY

A. City shall reimburse Subrecipient in accordance with the terms of this Agreement but only to such extent that grant funds are received from ARB.

B. The Executive Director or his or her designee is designated as the contract administrator for City and shall also decide any and all questions which may arise as to the quality or acceptability of the services performed and the manner of performance, the interpretation of instructions to Subrecipient and the acceptable completion of this Agreement and the amount of compensation due. Notwithstanding the preceding, the termination of this Agreement shall be governed by the provisions of Article X (Termination) hereof.

C. The parties agree that the scope of the work to be performed hereunder is of a demonstration nature only and the City shall not act other than to administer the Grant, to provide compensation and reimbursement to Subrecipient and to take any other actions specifically contemplated by this Agreement; the City shall not repair, replace, modify or otherwise perform any maintenance or services on the work and materials provided by Subrecipient hereunder.

III. EFFECTIVE DATE AND TERM OF AGREEMENT

A. Subject to the provisions of Charter Section 245, the effective date of this Agreement shall be the date of its execution by Executive Director upon authorization of the Board. Subrecipient is aware that the City Council, pursuant to Charter Section 245 of the City of Los Angeles, has the right to review this Agreement. Accordingly, in no

event shall this Agreement become effective until the sixth Council meeting day after Board action or the City Council's approval of the Agreement. City shall promptly notify Subrecipient when the agreement is effective.

B. This Agreement shall be in full force and effect commencing from the date of execution and shall continue until the earlier of the following occurs:

1. June 30, 2012;

or

2. The Board of Harbor Commissioners, in its sole discretion, terminates and cancels all or part of this Agreement for any reason upon giving to Subrecipient ten (10) days' notice in writing of its election to cancel and terminate this Agreement.

IV. [INTENTIONALLY LEFT BLANK]

V. COMPENSATION AND PAYMENT

A. As compensation for the satisfactory performance of the services required by this Agreement, City shall pay and reimburse Subrecipient at the rates set forth in Exhibit C, conditioned upon receipt of grant funds from ARB. The City shall immediately notify Subrecipient if it has reason to believe that ARB will not provide such funds.

B. The maximum payable under this Agreement, including reimbursable expenses if any (see Exhibit C), shall be Three Hundred Twenty Six Thousand, One Hundred and Seventy Eight Dollars (\$326,178).

C. Subrecipient shall submit invoices in quadruplicate to City monthly following the effective date of this Agreement for services performed during the preceding month. Each such invoice shall be signed by the Subrecipient and shall include the following certification:

"I certify under penalty of perjury that the above bill is just and correct according to the terms of Agreement No. _____ and that payment has not been received. I further certify that I have complied with the provisions of the City's Living Wage Ordinance.

(Subrecipient's Signature)

D. Subrecipient must include on the face of each itemized invoice submitted for payment its Business Tax Registration Certificate number, as required at Article VIII of this Agreement. No invoice will be processed for payment by City without this

number shown thereon. All invoices shall be approved by the Executive Director or his or her designee prior to payment. All invoices due and payable and found to be in order shall be paid as soon as, in the ordinary course of City business, the same may be approved, audited and paid.

Subrecipient shall submit appropriate supporting documents with each invoice. Such documents may include provider invoices, payrolls, and time sheets. The City may require, and Subrecipient shall provide, all documents reasonably required to determine whether amounts on the invoice are allowable expenses under this Agreement.

All invoices are subject to audit. Subrecipient is not required to submit support for direct costs items of \$25 or less.

E. For payment and processing, all invoices should be mailed to the following address:

Accounts Payable Section
Harbor Department, City of Los Angeles
P.O. Box 191
San Pedro, CA 90733-0191

VI. RECORDKEEPING AND AUDIT RIGHTS

A. Subrecipient shall keep and maintain full, complete and accurate books of accounts and records of the services performed under this Agreement in accordance with generally accepted accounting principles consistently applied, which books and records shall be readily accessible to and open for inspection and copying at the premises by City, its auditors or other authorized representatives (subject to confidentiality restrictions). Notwithstanding any other provision of this Agreement, material failure to do so shall constitute a conclusive waiver of any right to compensation for such services as are otherwise compensable hereunder. Such books and records shall be maintained by Subrecipient for a period of three (3) years after completion of services to be performed under this Agreement or until all disputes, appeals, litigation or claims arising from this Agreement have been resolved.

B. During the term of this Agreement, City may audit, review and copy any and all writings (as that term is defined in Section 250 of the California Evidence Code) of Subrecipient arising from or related to this Agreement or performance of the Scope of Work, whether such writings are (a) in final form or not, (b) prepared by Subrecipient or any individual or entity acting for or on behalf of Subrecipient, and (c) without regard to whether such writings have previously been provided to City. Subrecipient shall provide City at Subrecipient's sole cost and expense a copy of all such writings within fourteen (14) calendar days of a reasonable written request by City. City's right shall also include inspection at reasonable times of the Subrecipient's office or facilities which are engaged in the performance of the Scope of Work. Subrecipient shall, at no cost to City, furnish reasonable facilities and assistance for such review and audit.

Subrecipient's failure to comply with this Article VI shall constitute a material breach of this Agreement and shall entitle City to withhold any payment due under this Agreement until such breach is cured.

C. Any employee, auditor, representative, agent or inspector of the City that intends to come onto Subrecipient's site for auditing, inspection or any other purpose, must comply with such site's safety policies and procedures and must execute such site's standard visitor agreement.

VII. INDEPENDENT CONTRACTOR

Subrecipient, in the performance of the work required by this Agreement, is an independent contractor and not an agent or employee of City. Subrecipient shall not represent itself as an agent or employee of the City and shall have no power to bind the City in contract or otherwise.

VIII. BUSINESS TAX REGISTRATION CERTIFICATE

The City of Los Angeles Office of Finance requires the implementation and enforcement of Los Angeles Municipal Code Section 21.09 et seq. This Code Section provides that every person, other than a municipal employee, who engages in any business within the City of Los Angeles, is required to obtain the necessary Business Tax Registration Certificate and pay business taxes. The City Controller has determined that this Code Section applies to consulting firms that are doing work for the Department. See Exhibit E.

IX. INDEMNIFICATION

A. Indemnity for General Liability

Subrecipient shall at all times indemnify, protect, defend, and hold harmless City and any and all of its boards, officers, agents, or employees from and against all third party claims, charges, demands, costs, expenses (including counsel fees), judgments, civil fines, penalties, liabilities or losses of any kind or nature whatsoever which may be sustained or suffered by or secured against the City, its boards, officers, agents, and/or employees by reason of any damage to property, injury to persons, or any action that may arise out of the performance of this Agreement to the extent caused by the negligence or willful misconduct of Subrecipient, its boards, officers, agents, employees, or SubSubrecipients in performance of this Agreement.

B. Accident Reports

Subrecipient shall report in writing to Executive Director within fifteen (15) calendar days after it, its officers or managing agents have knowledge of any accident or occurrence involving death of or injury to any person or persons, or damage reasonably expected to be in excess of Five Hundred Dollars (\$500.00) to property,

occurring upon the City's premises where the work hereunder is being performed, if Subrecipient's officers, agents or employees are involved in such an accident or occurrence. Such report shall contain to the extent available (1) the name and address of the persons involved, (2) a general statement as to the nature and extent of injury or damage, (3) the date and hour of occurrence, (4) the names and addresses of known witnesses, and (5) such other information as may be known to Subrecipient, its officers or managing agents.

X. TERMINATION PROVISION

The Board of Harbor Commissioners, in its sole discretion, shall have the right to terminate and cancel all or any part of this Agreement for any reason upon giving the Subrecipient ten (10) days' advance, written notice of the Board's election to cancel and terminate this Agreement. In such an event, the Board shall compensate Subrecipient for work done hereunder prior to giving notice of such termination subject to receipt of funds from ARB. It is agreed that any Agreement entered into shall not limit the right of the City to hire additional Subrecipients or perform the services described in this Agreement either during or after the term of this Agreement.

XI. PERSONAL SERVICE AGREEMENT

Subrecipient acknowledges that it has been selected to perform the Scope of Work because of its experience, qualifications and expertise. Any assignment or other transfer of this Agreement or any part hereof shall be void provided, however, that Subrecipient may permit SubSubrecipient(s) to perform portions of the Scope of Work in accordance with Article I. All SubSubrecipients whom Subrecipient utilizes, however, shall be deemed to be its agents. SubSubrecipients' performance of the Scope of Work shall not be deemed to release Subrecipient from its obligations under this Agreement or to impose any obligation on the City to such SubSubrecipient(s) or give the SubSubrecipient(s) any rights against the City.

XII. AFFIRMATIVE ACTION

The Subrecipient, during the performance of this Agreement, shall not discriminate in its employment practices against any employee or applicant for employment because of employee's or applicant's race, religion, national origin, ancestry, sex, age, sexual orientation, disability, marital status, domestic partner status, or medical condition. The provisions of Section 10.8.4 of the Los Angeles Administrative Code shall be incorporated and made a part of this Agreement. All subcontracts awarded shall contain a like nondiscrimination provision. See Exhibit F.

XIII. SMALL BUSINESS DEVELOPMENT PROGRAM

It is the policy of the Department to provide Small Business Enterprises (SBE) and Minority-Owned, Women-Owned and all Other Business Enterprises (MBE/WBE/OBE) an equal opportunity to participate in the performance of all City

contracts in all areas where such contracts afford such participation opportunities. Subrecipient shall assist the City in implementing this policy and shall use its reasonable efforts to afford the opportunity for SBEs, MBEs, WBEs, and OBEs to achieve participation in subcontracts where such participation opportunities present themselves and attempt to ensure that all available business enterprises, including SBEs, MBEs, WBEs, and OBEs, have equal participation opportunity which might be presented under this Agreement. See Exhibit G.

XIV. CONFLICT OF INTEREST

It is hereby understood and agreed that the parties to this Agreement have read and are aware of the provisions of Section 1090 et seq. and Section 87100 et seq. of the California Government Code relating to conflict of interest of public officers and employees, as well as the Los Angeles Municipal Code (LAMC) Municipal Ethics and Conflict of Interest provisions of Section 49.5.1 et seq. and the Conflict of Interest Codes of the City and the Department. All parties hereto agree that they are unaware of any financial or economic interest of any public officer or employee of City relating to this Agreement. Notwithstanding any other provision of this Agreement, it is further understood and agreed that if such financial interest does exist at the inception of this Agreement, City may immediately terminate this Agreement by giving written notice thereof.

XV. COMPLIANCE WITH APPLICABLE LAWS

Subrecipient shall at all times in the performance of its obligations comply with all applicable laws, statutes, ordinances, rules and regulations, and with the reasonable requests and directions of Executive Director that are related to the work hereunder and provided in writing.

XVI. GOVERNING LAW / VENUE

This Agreement shall be governed by and construed in accordance with the laws of the State of California, without reference to the conflicts of law, rules and principles of such State. The parties agree that all actions or proceedings arising in connection with this Agreement shall be tried and litigated exclusively in the State or Federal courts located in the County of Los Angeles, State of California, in the judicial district required by court rules.

XVII. TRADEMARKS, COPYRIGHTS, AND PATENTS

Not applicable.

XVIII. PROPRIETARY INFORMATION

Not applicable.

XIX. CONFIDENTIALITY

The data, testing results, documents, reports, or other materials which contain information relating to the review, documentation, analysis and evaluation of the work described in this Agreement and any recommendations made by Subrecipient relative thereto shall be considered confidential and shall not be reproduced, altered, used or disseminated by either party or such party's employees or agents in any manner except and only to the extent necessary in the performance of the work under this Agreement for a period of five years after the term hereof. In addition, the parties are required to safeguard such information from access by unauthorized personnel. However, City's (and its employees' and agents') obligations under this section are subject to the California Public Records Act ("CPRA"). If confidential material of Subrecipient is requested, City shall promptly notify Subrecipient, and if Subrecipient agrees to indemnify City for withholding such information, City will withhold information for a reasonable period of time required for Subrecipient to seek judicial protection from disclosure.

XX. NOTICES

In all cases where written notice is to be given under this Agreement, service shall be deemed sufficient if said notice is deposited in the United States mail, postage prepaid. When so given, such notice shall be effective from the date of mailing of the same. For the purposes hereof, unless otherwise provided by notice in writing from the respective parties, notice to the Department shall be addressed to Director of Environmental, Los Angeles Harbor Department, P.O. Box 151, San Pedro, California 90733-0151, and notice to Subrecipient shall be addressed to it at the address set forth above. Nothing herein contained shall preclude or render inoperative service of such notice in the manner provided by law.

XXI. TAXPAYER IDENTIFICATION NUMBER (TIN)

The Internal Revenue Service (IRS) requires that all Subrecipients and suppliers of materials and supplies provide a TIN to the party that pays them. Subrecipient declares that its authorized TIN is 23-0411710. No payments will be made under this Agreement without a valid TIN.

XXII. SERVICE CONTRACTOR WORKER RETENTION POLICY AND LIVING WAGE POLICY REQUIREMENTS

The Board of Harbor Commissioners of the City of Los Angeles adopted Resolution No. 5771 on January 13, 1999, agreeing to adopt the provisions of Los Angeles City Ordinance No. 171004 relating to Service Contractor Worker Retention (SCWR), Section 10.36 et seq. of the Los Angeles Administrative Code, as the policy of the Department. Further, Charter Section 378 requires compliance with the City's Living Wage requirements as set forth by ordinance, Section 10.37 et seq. of the

Los Angeles Administrative Code. Subrecipient shall comply with the policy wherever applicable. Violation of this provision, where applicable, shall entitle the City to terminate this Agreement and otherwise pursue legal remedies that may be available.

XXIII. WAGE AND EARNINGS ASSIGNMENT ORDERS / NOTICES OF ASSIGNMENTS

The Subrecipient and/or any SubSubrecipient are obligated to fully comply with all applicable state and federal employment reporting requirements for the Subrecipient and/or SubSubrecipient's employees.

The Subrecipient and/or SubSubrecipient shall certify that the principal owner(s) are in compliance with any Wage and Earnings Assignment Orders and Notices of Assignments applicable to them personally. The Subrecipient and/or SubSubrecipient will fully comply with all lawfully served Wage and Earnings Assignment Orders and Notices of Assignments in accordance with Cal. Family Code Sections 5230 et seq. The Subrecipient or SubSubrecipient will maintain such compliance throughout the term of this Agreement.

XXIV. EQUAL BENEFITS POLICY

The Board of Harbor Commissioners of the City of Los Angeles adopted Resolution No. 6328 on January 12, 2005, agreeing to adopt the provisions of Los Angeles City Ordinance No. 172,908, as amended, relating to Equal Benefits, Section 10.8.2.1 et seq. of the Los Angeles Administrative Code, as a policy of the Department. Subrecipient shall comply with the policy wherever applicable. Violation of this policy shall entitle the City to terminate any Agreement with Subrecipient and pursue any and all other legal remedies that may be available. See Exhibit H.

XXV. STATE TIDELANDS GRANTS

This Agreement is entered into in furtherance of and as a benefit to the State Tidelands Grant and the trust created thereby. Therefore, this Agreement is at all times subject to the limitations, conditions, restrictions and reservations contained in and prescribed by the Act of the Legislature of the State of California entitled "An Act Granting to the City of Los Angeles the Tidelands and Submerged Lands of the State Within the Boundaries of Said City," approved June 3, 1929 (Stats. 1929, Ch. 651), as amended, and provisions of Article VI of the Charter of the City of Los Angeles relating to such lands. Subrecipient agrees that any interpretation of this Agreement and the terms contained herein must be consistent with such limitations, conditions, restrictions and reservations.

XXVI. INTEGRATION

This Agreement contains the entire understanding and agreement between the

parties hereto with respect to the matters referred to herein. No other representations, covenants, undertakings, or prior or contemporaneous agreements, oral or written, regarding such matters which are not specifically contained, referenced, and/or incorporated into this Agreement by reference shall be deemed in any way to exist or bind any of the parties. Each party acknowledges that it has not been induced to enter into the Agreement and has not executed the Agreement in reliance upon any promises, representations, warranties or statements not contained, referenced, and/or incorporated into the Agreement. **THE PARTIES ACKNOWLEDGE THAT THIS AGREEMENT IS INTENDED TO BE, AND IS, AN INTEGRATED AGREEMENT.**

XXVII. SEVERABILITY

Should any part, term, condition or provision of this Agreement be declared or determined by any court of competent jurisdiction to be invalid, illegal or incapable of being enforced by any rule of law, public policy, or city charter, the validity of the remaining parts, terms, conditions or provisions of this Agreement shall not be affected thereby, and such invalid, illegal or unenforceable part, term, condition or provision shall be treated as follows: (a) if such part, term, condition or provision is immaterial to this Agreement, then such part, term, condition or provision shall be deemed not to be a part of this Agreement; or (b) if such part, term, condition or provision is material to this Agreement, then the parties shall revise the part, term, condition or provision so as to comply with the applicable law or public policy and to effect the original intent of the parties as closely as possible.

XXVIII. CONSTRUCTION OF AGREEMENT

This Agreement shall not be construed against the party preparing the same, shall be construed without regard to the identity of the person who drafted such and shall be construed as if all parties had jointly prepared this Agreement and it shall be deemed their joint work product; each and every provision of this Agreement shall be construed as though all of the parties hereto participated equally in the drafting hereof; and any uncertainty or ambiguity shall not be interpreted against any one party. As a result of the foregoing, any rule of construction that a document is to be construed against the drafting party shall not be applicable.

XXIX. TITLES AND CAPTIONS

The parties have inserted the Article titles in this Agreement only as a matter of convenience and for reference, and the Article titles in no way define, limit, extend or describe the scope of this Agreement or the intent of the parties in including any particular provision in this Agreement.

XXX. MODIFICATION IN WRITING

This Agreement may be modified only by written agreement of all parties. Any such modifications are subject to all applicable approval processes required by, without

limitation, City's Charter and City's Administrative Code.

XXXI. WAIVER

A failure of any party to this Agreement to enforce the Agreement upon a breach or default shall not waive the breach or default or any other breach or default. All waivers shall be in writing.

XXXII. EXHIBITS; ARTICLES

All exhibits to which reference is made in this Agreement are deemed incorporated in this Agreement, whether or not actually attached. To the extent the terms of an exhibit conflict with or appear to conflict with the terms of the body of the Agreement, the terms of the body of the Agreement shall control. References to Articles are to Articles of this Agreement unless stated otherwise.

XXXIII. LIMITATION OF LIABILITY

Neither party shall be liable to the other, under any theory of recovery, for any special, indirect, remote, punitive, incidental, speculative or consequential losses or damages, or loss of profits in connection with this Agreement. The parties expressly agree that under no circumstances shall the total aggregate liability of Subrecipient under this Agreement, under any theory of recovery, exceed the total compensation paid to Subrecipient as specified for Subrecipient's on Exhibit B (Scope of Work). The provisions of this Article XXXIII shall prevail over any conflicting or inconsistent provisions set forth elsewhere herein or in any documents related to the Agreement, except that it shall not apply to liabilities to third parties under SECTION IX, INDEMNIFICATION.

XXXIV. WARRANTIES

For the term of this Agreement, Subrecipient warrants that the installation has been performed in a workmanlike manner, and the materials are of good quality, provided, however, that SUBRECIPIENT MAKES NO REPRESENTATIONS OR WARRANTIES OF ANY KIND, WHETHER EXPRESSS OR IMPLIED, WITH RESPECT TO THE RESULTS OR OUTCOME OF THE DEMONSTRATION PROJECT HEREUNDER, AND EXCEPT AS PROVIDED IN THIS SECTION XXXIV, MAKES NO OTHER IREPRESENTATION OR WARRANTIES OF ANY KIND, INCLUDING, WITHOUT LIMITATION, WITH RESPECT TO MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.

