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DATE: August 21, 2013  
TO: Honorable Mayor and City Councilmembers  
FROM: Public Works Department  
SUBJECT: **APPROVAL OF A PROFESSIONAL SERVICES AGREEMENT FOR UTILITY BILL ANALYSIS**

**SYNOPSIS**

Staff recommends that the City Council approve a three-year percentage-based professional services agreement with Utility Cost Management, LLC, of Santa Monica, to provide utility bill analysis for the Public Works Department; and authorize the City Manager to execute the agreement.

**BACKGROUND**

Utility Cost Management (UCM) specializes in the rules and regulations that govern what utility companies can charge their customers in California. UCM has provided these services to numerous private companies, public agencies, special districts, schools, hospitals and hotels in California which include reviewing telecommunications, water, sewer, waste disposal, gas and electricity accounts as well as negotiating with utility providers and possibly seeking relief from the California Public Utilities Commission in a complaint proceeding if necessary. UCM will review, interpret and apply current regulations to utility bills in order to uncover billing errors and guarantee bills are in line with the latest regulations.

**ANALYSIS**

UCM will review any utility accounts provided by the City. When billing errors are discovered and corrected, UCM will receive a percentage of the refunds, credits and future savings and will be paid only if errors are found. The agreement is for a term of three years and the City will keep all future savings after the third year. Any energy efficiency retrofit projects completed during the three-year period will not have an effect on the terms of the agreement.

**FISCAL IMPACT**

The three-year agreement cost will be based on the amount of refunds, credits and future savings that are identified. If the City receives a refund, credit or future savings, UCM will be paid 42% of the amount refunded, credited or saved in the future for three years. The compensation paid to UCM will be funded through the City account number

that each utility bill is currently charged. Future Savings is defined as the amount by which the City's charges on its utility accounts are reduced as a result of a change in the billing rate. Future savings will be calculated as the difference between the amount the City was billed on its utility accounts during the three-year savings period, and the amount that it would have been billed on its utility accounts during the three-year savings period if there had been no change in its billing rate. The three-year savings period begins on the date that the change in the billing rate is first reflected on the City's utility bill, and ends three years thereafter. The actual cost of the agreement will not be known until the bills are reviewed and errors are identified. Results of these services have varied by a wide range of amounts among the cities that have used this consultant. The agreement is being submitted to City Council for approval due to the possibility of paying the consultant at least \$50,000 total for the three-year agreement. The compensation for these services is fair and reasonable and below industry fair market values.

**INSURANCE REQUIREMENTS**

The City's standard insurance requirements will be met.

**COMMISSION OR COMMITTEE REPORT**

Does not apply.

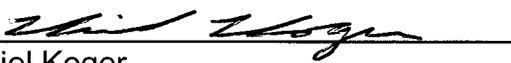
**CITY ATTORNEY ANALYSIS**

The referenced documents have been reviewed by the City Attorney and approved as to form.

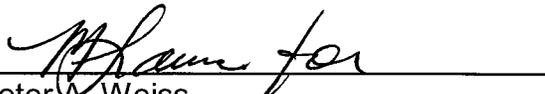
**RECOMMENDATION**

Staff recommends that the City Council approve a three-year percentage-based professional services agreement with Utility Cost Management, LLC, of Santa Monica, to provide utility bill analysis for the Public Works Department; and authorize the City Manager to execute the agreement.

PREPARED BY:

  
H. Kiel Koger  
Maintenance and Operations Manager

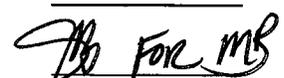
SUBMITTED BY:

  
Peter A. Weiss  
City Manager

REVIEWED BY:

Michelle Skaggs Lawrence, Deputy City Manager

Michael Blazenski, Interim Financial Services Director



**CITY OF OCEANSIDE**

**PROFESSIONAL CONSULTANT SERVICES AGREEMENT**

**PROJECT: UTILITY BILL ANALYSIS**

THIS AGREEMENT, dated \_\_\_\_\_, 2013 for identification purposes, is made and entered into by and between the CITY OF OCEANSIDE, a municipal corporation, hereinafter designated as "CITY", and UTILITY COST MANAGEMENT, LLC hereinafter designated as "CONSULTANT."

**NOW THEREFORE, THE PARTIES MUTUALLY AGREE AS FOLLOWS:**

1. **SCOPE OF WORK.** The project is more particularly described as follows:  
Review gas and electricity accounts as well as negotiate with utility providers and possibly seek relief from the California Public Utilities Commission in a complaint proceeding if necessary. Apply utility regulations to bills in order to uncover billing errors from rates, tariffs, etc... and guarantee utility bills are in line with the latest regulations. Attachment A entitled "Agreement to provide utility bill auditing service" is attached hereto and incorporated herein by this reference.
2. **INDEPENDENT CONSULTANT.** CONSULTANT'S relationship to the CITY shall be that of an independent contractor. CONSULTANT shall have no authority, express or implied, to act on behalf of the CITY as an agent, or to bind the CITY to any obligation whatsoever, unless specifically authorized in writing by the CITY. CONSULTANT shall be solely responsible for the performance of any of its employees, agents, or subcontractors under this Agreement. CONSULTANT shall report to the CITY any and all employees, agents, and consultants performing work in connection with this project, and all shall be subject to the approval of the CITY.
3. **WORKERS' COMPENSATION.** Pursuant to Labor Code section 1861, the CONSULTANT hereby certifies that the CONSULTANT is aware of the provisions of Section 3700 of the Labor Code which require every employer to be insured against liability for Workers' Compensation or to undertake self-insurance in accordance with the provisions of that Code, and the CONSULTANT will comply with such provisions, and provide certification of such compliance as a part of this Agreement.
4. **LIABILITY INSURANCE.**
  - 4.1. CONSULTANT shall, throughout the duration of this Agreement maintain comprehensive general liability and property damage insurance, or commercial

## UTILITY BILL ANALYSIS

general liability insurance, covering all operations of CONSULTANT, its agents and employees, performed in connection with this Agreement including but not limited to premises and automobile.

**4.2** CONSULTANT shall maintain liability insurance in the following minimum limits:

Comprehensive General Liability Insurance  
(bodily injury and property damage)

Combined Single Limit per Occurrence	\$ 1,000,000
General Aggregate	\$ 2,000,000*

Commercial General Liability Insurance  
(bodily injury and property damage)

General limit per occurrence	\$ 1,000,000
General limit project specific aggregate	\$ 2,000,000

<u>Automobile Liability Insurance</u>	\$ 1,000,000
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\*General aggregate per year, or part thereof, with respect to losses or other acts or omissions of CONSULTANT under this Agreement.

- 4.3** If coverage is provided through a Commercial General Liability Insurance policy, a minimum of 50% of each of the aggregate limits shall remain available at all times. If over 50% of any aggregate limit has been paid or reserved, the CITY may require additional coverage to be purchased by the CONSULTANT to restore the required limits. The CONSULTANT shall also notify the CITY promptly of all losses or claims over \$25,000 resulting from work performed under this contract, or any loss or claim against the CONSULTANT resulting from any of the CONSULTANT'S work.
- 4.4** All insurance companies affording coverage to the CONSULTANT for the purposes of this Section shall add the City of Oceanside as "additional insured" under the designated insurance policy for all work performed under this agreement. Insurance coverage provided to the City as additional insured shall be primary insurance and other insurance maintained by the City of Oceanside, its officers, agents, and employees shall be excess only and not contributing with insurance provided pursuant to this Section.
- 4.5** All insurance companies affording coverage to the CONSULTANT pursuant to this agreement shall be insurance organizations admitted by the Insurance Commissioner of the State of California to transact business of insurance in the state or be rated as

## UTILITY BILL ANALYSIS

A-X or higher by A.M. Best.

- 4.6 CONSULTANT shall provide thirty (30) days written notice to the CITY should any policy required by this Agreement be cancelled before the expiration date. For the purposes of this notice requirement, any material change in the policy prior to the expiration shall be considered a cancellation.
- 4.7 CONSULTANT shall provide evidence of compliance with the insurance requirements listed above by providing, at minimum, a Certificate of Insurance and applicable endorsements, in a form satisfactory to the City Attorney, concurrently with the submittal of this Agreement.
- 4.8 CONSULTANT shall provide a substitute Certificate of Insurance no later than thirty (30) days prior to the policy expiration date. Failure by the CONSULTANT to provide such a substitution and extend the policy expiration date shall be considered a default by CONSULTANT and may subject the CONSULTANT to a suspension or termination of work under the Agreement.
- 4.9 Maintenance of insurance by the CONSULTANT as specified in this Agreement shall in no way be interpreted as relieving the CONSULTANT of any responsibility whatsoever and the CONSULTANT may carry, at its own expense, such additional insurance as it deems necessary.

5. **PROFESSIONAL ERRORS AND OMISSIONS INSURANCE.** N/A

6. **CONSULTANT'S INDEMNIFICATION OF CITY.** To the greatest extent allowed by law, CONSULTANT shall indemnify and hold harmless the CITY and its officers, agents and employees against all claims for damages to persons or property arising out of the negligent acts, errors or omissions or wrongful acts or conduct of the CONSULTANT, or its employees, agents, subcontractors, or others in connection with the execution of the work covered by this Agreement, except for those claims arising from the willful misconduct, sole negligence or active negligence of the CITY, its officers, agents, or employees. CONSULTANT'S indemnification shall include any and all costs, expenses, attorneys' fees, expert fees and liability assessed against or incurred by the CITY, its officers, agents, or employees in defending against such claims or lawsuits, whether the same proceed to judgment or not. Further, CONSULTANT at its own expense shall, upon written request by the CITY, defend any such suit or action brought against the CITY, its officers, agents, or employees resulting or arising from the conduct, tortious acts or omissions of the CONSULTANT.

CONSULTANT'S indemnification of CITY shall not be limited by any prior or subsequent declaration by the CONSULTANT.

## UTILITY BILL ANALYSIS

7. **COMPENSATION.** CONSULTANTS compensation for all work performed in accordance with this Agreement, shall be in accordance with Attachment A.

No work shall be performed by CONSULTANT in excess of compensation specified in Attachment A without prior written approval of the CITY. CONSULTANT shall obtain approval by the CITY prior to performing any work that result in incidental expenses to CITY.

8. **TIMING REQUIREMENTS.** Time is of the essence in the performance of work under this Agreement and the timing requirements shall be strictly adhered to unless otherwise modified in writing. The term of this Agreement is for three (3) years in accordance with Attachment A.
9. **ENTIRE AGREEMENT.** This Agreement comprises the entire integrated understanding between CITY and CONSULTANT concerning the work to be performed for this project and supersedes all prior negotiations, representations, or agreements.
10. **INTERPRETATION OF THE AGREEMENT.** The interpretation, validity and enforcement of the Agreement shall be governed by and construed under the laws of the State of California. The Agreement does not limit any other rights or remedies available to CITY.

The CONSULTANT shall be responsible for complying with all local, state, and federal laws whether or not said laws are expressly stated or referred to herein.

Should any provision herein be found or deemed to be invalid, the Agreement shall be construed as not containing such provision, and all other provisions, which are otherwise lawful, shall remain in full force and effect, and to this end the provisions of this Agreement are severable.

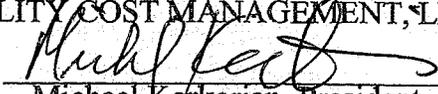
11. **AGREEMENT MODIFICATION.** This Agreement may not be modified orally or in any manner other than by an agreement in writing signed by the parties hereto.
12. **TERMINATION OF AGREEMENT.** Either party may terminate this Agreement by providing seven (7) days written notice to the other party in accordance with Attachment A. If any portion of the work is terminated or abandoned by the CITY, then the CITY shall pay CONSULTANT for any work completed up to and including the date of termination or abandonment of this Agreement in accordance with Attachment A. The CITY shall be required to compensate the CONSULTANT only for work performed in accordance with the Agreement up to and including the date of termination in accordance with Attachment A.

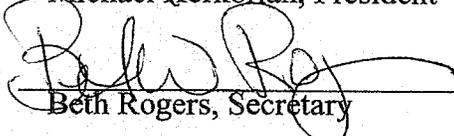
**UTILITY BILL ANALYSIS**

13. **SIGNATURES.** The individuals executing this Agreement represent and warrant that they have the right, power, legal capacity and authority to enter into and to execute this Agreement on behalf of the respective legal entities of the CONSULTANT and the CITY.

IN WITNESS WHEREOF, the parties hereto for themselves, their heirs, executors, administrators, successors, and assigns do hereby agree to the full performance of the covenants herein contained and have caused this Professional CONSULTANT Services Agreement to be executed by setting hereunto their signatures on the dates set forth below.

UTILITY COST MANAGEMENT, LLC

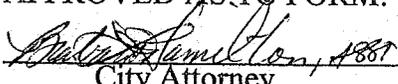
By:   
Michael Kerkorian, President

By:   
Beth Rogers, Secretary

94-3142741  
Employer ID No.

CITY OF OCEANSIDE

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

APPROVED AS TO FORM:  
  
City Attorney

**NOTARY ACKNOWLEDGMENTS OF CONSULTANT MUST BE ATTACHED.**

### CERTIFICATE OF ACKNOWLEDGMENT

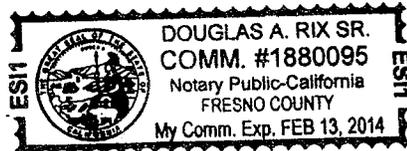
State of California )  
County of FRESNO )

On August 1, 2013 before me, Douglas A. Rix Sr. Notary Public,  
Date (here insert name and title of the officer)  
personally appeared Beth Rogers  
Name(s) of Signer(s)

who proved to me on the basis of satisfactory evidence to be the person (~~s~~) whose name (~~s~~) is/~~are~~ subscribed to the within instrument and acknowledged to me that ~~he~~/she/~~they~~ executed the same in ~~his~~/her/~~their~~ authorized capacity (~~ies~~), and that by ~~his~~/her/~~their~~ signature (~~s~~) on the instrument the person (~~s~~), or the entity upon behalf of which the person (~~s~~) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.



Signature [Handwritten Signature]  
Signature of Notary Public

Place Notary Seal Above

**CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT**

STATE OF CALIFORNIA

County of LOS ANGELES }

On Aug 2, 2013 before me, Kelly Charpenet, Notary Public  
Date Here Insert Name and Title of the Officer

personally appeared Michael Kerkorian  
Name(s) of Signer(s)

who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

Witness my hand and official seal.

Signature Kelly Charpenet  
Signature of Notary Public



Place Notary Seal Above

**OPTIONAL**

Though the information below is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent removal and reattachment of this form to another document.

**Description of Attached Document**

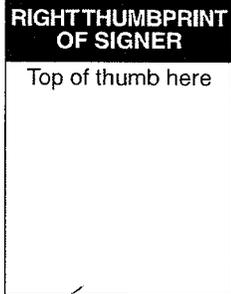
Title or Type of Document: Professional Consultant Services Agreement  
Document Date: 8/2/2013 Number of Pages: \_\_\_\_\_

Signer(s) Other Than Named Above: \_\_\_\_\_

**Capacity(ies) Claimed by Signer(s)**

Signer's Name: \_\_\_\_\_

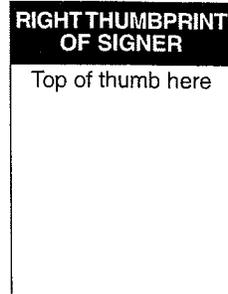
- Individual
- Corporate Officer — Title(s): \_\_\_\_\_
- Partner —  Limited  General
- Attorney in Fact
- Trustee
- Guardian or Conservator
- Other: \_\_\_\_\_



Signer Is Representing: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Signer's Name: \_\_\_\_\_

- Individual
- Corporate Officer — Title(s): \_\_\_\_\_
- Partner —  Limited  General
- Attorney in Fact
- Trustee
- Guardian or Conservator
- Other: \_\_\_\_\_



Signer Is Representing: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

ATTACHMENT A

**AGREEMENT TO PROVIDE  
UTILITY BILL AUDITING SERVICE**

This agreement is made by and between Utility Cost Management LLC ("UCM") and the entity signing below ("Client") as follows:

1. **Applicable to Client's Utility Accounts.** Unless otherwise stated in an addendum initialed by both parties, this Agreement will apply to all telecommunications (including voice, data, cellular, long distance, VOIP), water, sewer, garbage, gas and electricity accounts (and any related utility user taxes, other taxes, assessments, surcharges or fees) with respect to which Client:
  - (a) is receiving utility service as of the Effective Date (as defined below),
  - (b) has received utility service within three years prior to the Effective Date,
  - (c) receives utility service within one year after the Effective Date, or
  - (d) has permitted or authorized UCM to obtain a copy of the utility bill.The telecommunications, water, sewer, garbage, gas and electric accounts described in this paragraph are hereinafter collectively referred to as "Utility Accounts". The "Effective Date", as that term is used above, is the first day of the calendar month after both UCM and Client have signed this Agreement.
2. **Client to Provide Utility Bills.** On or promptly after Client's execution of this Agreement, Client will provide UCM with a copy of at least one month's utility bills for all of Client's Utility Accounts.
3. **UCM Authorized to Obtain Information on Utility Accounts.** UCM is hereby authorized to obtain and review information relating to the Utility Accounts. If site visits are necessary, UCM will first obtain proper authorization.
4. **UCM's Findings Letter.** UCM will use its best efforts to identify the basis for any refunds, credits or Future Savings (as defined below) on Client's Utility Accounts. UCM will send one or more a "Findings Letters" to Client that generally sets forth the basis for any refunds, credits or Future Savings identified by UCM. UCM may, from time to time, supplement or amend the Findings Letter.
5. **Steps to Obtain Refunds or Savings.** UCM is authorized by Client to take steps to obtain the refunds, credits or Future Savings identified in the Findings Letter. Such steps may include, but are not limited to, communicating, negotiating and dealing with utility providers (or, in the case of utility user taxes or other governmental charges, the appropriate government entity), and seeking relief from the California Public Utilities Commission in a complaint proceeding or other proceeding.
6. **Cooperation By Client.** Client will cooperate with UCM, as reasonable, in UCM's efforts to carry out the purposes and intent of this Agreement. Such cooperation will include, but not be limited to, providing information upon request by UCM concerning Client's utility expenditures, utility service and operations.
7. **UCM's Compensation.**

UCM's compensation will consist of the amounts set forth in both (a) and (b) below.

- (a) **Refunds or Credits.** If Client receives a refund or credit that was identified in the Findings Letter, then Client will pay to UCM 42% of the amount refunded or credited. The amount of the refund or credit for this purpose will include all amounts refunded or credited (including any portion attributable to interest) for any overcharges that were incurred by Client prior to the date that the overcharges no longer appeared on the Client's utility bill. Payment of UCM's 42% compensation is due within 30 days of the date UCM mails an invoice to Client.
- (b) **Future Savings.** If Client obtains Future Savings that were identified in the Findings Letter, then Client will pay UCM 42% of such Future Savings that accrue during a Three-Year Savings Period. "Future Savings" is the amount by which Client's charges on its Utility Accounts are reduced as a result of a change in the billing rate, calculation, method or procedure. Future Savings will be calculated as the difference between the amount Client was billed on its Utility Accounts during the Three-Year Savings Period, and the amount that it would have been billed on its Utility Accounts during the Three-Year Savings Period if there had been no change in its billing rate, calculation, method or procedure. The Three-Year Savings Period begins on the date that the change in the billing rate, calculation, method or procedure is first reflected on Client's utility bill, and ends three years thereafter. UCM will

## ATTACHMENT A

submit invoices periodically to Client for payment based on the Future Savings as they accrue. The invoices will verify (a) that Future Savings have actually been realized by Client, and (b) the amount of such Future Savings. Payment of UCM's invoices is due within 30 days of the date the invoices are mailed to Client. The compensation under this subparagraph will not include compensation for Future Savings that are the result of a reduction in the amount of utility usage by Client.

- (c) **Client's Prior Knowledge of Basis For Refund, Credit, or Future Savings.** Client is not obligated to pay UCM pursuant to this paragraph for any refund, credit or Future Savings received by Client for which Client had submitted to the utility provider a written claim prior to the date of UCM's Findings Letter.
8. **Termination; Effect.** This Agreement will terminate 7 days after either party faxes a written notice of termination to the other party. Upon termination, UCM will cease all work on behalf of Client. However, if termination occurs after UCM has sent its Findings Letter to Client, then Client will remain obligated to pay UCM, pursuant to this Agreement, for any refunds, credits or Future Savings that were identified in the Findings Letter and that are thereafter obtained by Client. UCM may continue to obtain and review Client's utility billing and other information following termination in order to periodically verify whether Client has obtained a refund, credit or Future Savings that was identified in the Findings Letter.
9. **Subcontract of Telecommunications Audit.** UCM may engage an outside firm (the "Subcontractor") to perform some or all of the following: obtain and review Client's telecommunications accounts (Paragraph 3), identify the basis for any refunds, credits or Future Savings on such telecommunications accounts (Paragraph 4), and take steps to obtain the refunds, credits or Future Savings on such telecommunications accounts that are identified in the Findings Letter (Paragraph 5). Payment of the Subcontractor's compensation, if any, will be the sole responsibility of UCM, and not Client. Client hereby acknowledges and consents to UCM's engagement of a Subcontractor as described herein.
10. **If Client Is Not Utility Customer.** By providing a copy of any utility bill to UCM, Client is thereby agreeing that the Utility Account represented by such bill will be governed by this Agreement, regardless of whether or not Client is the Utility Customer with respect to such Utility Account. For purposes of this Agreement, the Utility Customer is the entity that (i) is named on the Utility Account as reflected by the utility bill, (ii) receives the utility service on the Utility Account, (iii) pays for or is liable for the charges on the Utility Account, or (iv) is the owner of the property at which the utility service is provided on the Utility Account. If Client is not the Utility Customer for a Utility Account then, with respect to that Utility Account, Client represents that it is signing this Agreement in its capacity as agent for the Utility Customer, and as such is authorized to legally bind the Utility Customer to the terms of this Agreement. Client further agrees that the terms of this Agreement will be equally binding on both Client and Customer, that all references in this Agreement to "Client" will also be deemed to be references to the Utility Customer, and that Client and the Utility Customer will be jointly and severally liable for payment of UCM's compensation under this Agreement.
11. **No Legal Services.** Client acknowledges and understands that: (1) Only an attorney can provide legal services or advice, (2) UCM is not an attorney or law firm, and does not and will not provide legal services or advice, (3) UCM does not and will not act as an attorney for Client or any other person, (4) Nothing in this Agreement, and no act, omission or statement by UCM, or its owners or employees, will be construed to create an attorney-client relationship between UCM and Client or any other person, (5) UCM is not subject to the California Rules of Professional Conduct, which govern the conduct of attorneys, and (6) Client should consult an attorney if it wishes to receive legal services or advice.
12. **Disclosure of Information.** UCM may obtain information that pertains to Client's business, operations, or affairs, including but not limited to its utility charges and utility usage. Client expressly authorizes UCM to use and disclose such information to others as necessary or convenient to carry out the services contemplated by this Agreement.
13. **Release of Claims Against UCM.** Client acknowledges and agrees that UCM has made no express or implied representation or warranty that it will be successful in identifying or obtaining any refunds, credits, or Future Savings on Client's Utility Accounts. Client hereby covenants not to bring any action for damages against UCM that is based upon or relates to any failure by UCM to identify or obtain refunds, credits, or Future Savings to which Client was or is entitled.
14. **Late Payment Penalty.** If payment of any invoice is not received by UCM within 30 days of the date the invoice was mailed, then interest on the amount owing will accrue, beginning on the 31<sup>st</sup> day after the invoice was mailed to Client, at the rate of 1% per month (prorated on a daily basis). In addition, if any payment is not received by UCM within 60 days of the date the invoice was mailed to Client, then a fee equal to 5% of the amount owing (including any accrued interest)

## ATTACHMENT A

will be imposed on the 61<sup>st</sup> day after the invoice was mailed. Interest will continue to accrue at 1% per month (prorated on a daily basis) on the entire amount due until paid in full.

15. **Venue.** Venue in any legal action arising from or related to this agreement will be San Diego County, California.
16. **Severability.** If any term, provision, covenant, or condition of this Agreement is held by a court of competent jurisdiction to be invalid, void, or unenforceable, the rest of the agreement shall remain in full force and effect and shall in no way be affected, impaired or invalidated.
17. **Interpretation.** In construing this Agreement, no consideration shall be given to the fact or presumption that any party had a greater or lesser hand in drafting of this Agreement.