

1 emergencies. The Parties acknowledge that the District will, simultaneously with the
2 execution of this Agreement, enter into similar agreements with other service providers
3 so as to ensure that multiple service providers will be available to the District during a
4 flood emergency and acknowledge that the District may choose to obtain services from
5 one or more of such service providers without requesting services from the remaining
6 service provider(s).

7

8

Agreements

9

The Parties agree as follows:

10

1. *Term.* The term of this Agreement shall be for a period of three years,
11 commencing upon the above-written effective date.

12

2. *Contact Information for Service Provider.* No later than each October 1, the
13 Service Provider shall provide the District with a written statement identifying the
14 representative(s) of the Service Provider who should be notified in the manner
15 described in paragraph 3 below. The written statement must include the
16 representative(s)' office telephone number, cellular telephone number, pager
17 number, home telephone number and e-mail address. The written statement must
18 also identify the single telephone number by which the representative(s) may be
19 reached at any time, day or night, during the flood season. Finally, in the event
20 that the Service Provider identifies more than one representative, it shall be the
21 duty and responsibility of the Service Provider to identify the order in which said
22 representatives should be contacted by the District in the event of a flood
23 emergency. The representative(s) of the Service Provider shall be available at the
24 identified telephone number(s) 24 hours/day, seven days/week during the flood
25 season, which is defined for purposes of this Agreement as extending from each
26 November 1 to each April 15.

1 3. *Identification of Potential Flood Emergency and Notification of Service Provider.*
2 The District shall make reasonable efforts to identify, at the earliest possible time,
3 any storms, infrastructure damage, conditions, or other unanticipated events that
4 may create a serious risk of flooding within the District's boundaries.

5 a. Upon learning of a potential flood risk, the District may, in its sole
6 discretion, notify the Service Provider of such flood risk, either by oral or
7 by written communication (including, but not limited to, e-mail, phone
8 call or fax). Such notification shall include the nature of the threat, best
9 estimate of timing of the threat, and general description of the materials,
10 equipment and services which may be needed. The District may, in its
11 sole discretion, choose not to notify the Service Provider and instead rely
12 on other service providers to provide any needed materials, supplies,
13 equipment or personnel.

14 b. If the District notifies the Service Provider about a risk of potential
15 flooding, the District shall update the information given to the Service
16 Provider as often as the District deems necessary but not less than once
17 every 24 hours until the District determines that the risk of flooding has
18 passed.

19 c. Upon receiving the District's notification of a potential flood risk, the
20 Service Provider shall use its best efforts to ensure that adequate flood
21 response supplies, equipment and personnel will be available for prompt
22 deployment to the site(s) identified by the District.

23 4. *Identification of Actual Flood Emergency Situation, Notification of Service*
24 *Provider and Response of Service Provider.*

25 a. Upon discovery of an actual emergency situation which threatens the flood
26 control system including, but not limited to, a boil, levee erosion,
27 wind/wave wash erosion, sloughing of levee, slip surface failure,

1 settlement, levee or foundation seepage, cracks in a levee, the threat of
2 overtopping of a levee, or any other condition that threatens the integrity
3 of the District's flood control system, the District may immediately notify
4 the Service Provider of the emergency situation, giving a description of
5 the problem, and shall designate as specifically as practicable the work to
6 be done to address the emergency situation including generally identifying
7 the materials, equipment, and services which may be needed to conduct
8 the flood fight. The District shall be entitled to give verbal notification to
9 the Service Provider to immediately deploy equipment, materials and
10 personnel to the designated site(s).

11 b. Upon receiving the District's verbal or other notification of the emergency
12 situation, the Service Provider(s) shall immediately begin mobilization of
13 the anticipated materials, equipment and personnel based on the
14 information from the District and shall have supervisory personnel on site
15 as quickly as possible and in all cases within approximately 2 hours to
16 assess the situation with the District representative. The Service Provider,
17 in consultation with the District, is responsible for determining the
18 required materials, equipment and personnel and construction methods
19 specifically required to perform the tasks directed by the District

20 c. Initial deployment of materials, equipment and personnel shall occur as
21 quickly as possible and in all cases within 4 hours of the initial notification
22 by the District with full deployment within 8 hours.

23 d. The Service Provider shall use its best efforts to fully cooperate and
24 coordinate its activities with any other emergency providers also called to
25 the site by the District or other flood control representatives such as the
26 City of Sacramento, County of Sacramento, State Department of Water
27 Resources, and U.S. Army Corps of Engineers.

- 1 e. The Service Provider shall use its best efforts to provide sufficient
2 materials, equipment and personnel to meet the District's needs, even to
3 the extent of locating and subcontracting work to other qualified
4 contractors.
- 5 5. *Payment.* The District shall pay Service Provider for the supplies, equipment or
6 personnel provided in response to a request pursuant to paragraph 4 above as
7 follows:
- 8 a. *Labor.* The Service Provider shall be paid the cost of labor for the workers
9 (including on-site, full time superintendent/foremen when authorized by
10 the District), used in the actual and direct performance of the work. The
11 cost of labor, whether the employer is the Service Provider, a
12 subcontractor, or other forces, will be the sum of the following:
- 13 (1) Actual Wages-The actual wages paid shall include, in addition to
14 wages paid to workers, any employer payments to or on behalf of
15 the workers for health and welfare, pension, vacation, and similar
16 purposes.
- 17 (2) Labor Surcharge-The labor surcharge to be added to the actual
18 wage shall be 26% and this shall constitute full compensation for
19 all payments imposed by State and Federal laws, and for all other
20 payments made to, or on behalf of, the workers, other than actual
21 wages as defined above.
- 22 b. *Materials.* The actual cost of the materials to the purchaser, whether the
23 Service Provider, a subcontractor or other forces. If the Service Provider
24 does not furnish satisfactory evidence of the cost of such materials, it shall
25 be deemed to be the current fair market price at which such materials are
26 available in the quantities concerned delivered to the job site. The District

1 reserves the right to furnish such materials as it deems advisable, and the
2 Service Provider shall have no claims for costs or profit on such materials.

3 c. *Equipment.* The use of equipment shall be paid for at the rates listed for
4 such equipment in the current compilation of rental rates of the State of
5 California, Department of Transportation, applicable to Sacramento
6 County. The reduction factor for equipment use beyond the normal 8-hour
7 working day shall not apply to this Agreement. If the equipment is not
8 shown on the above mentioned list, the Service Provider shall be paid such
9 hourly rental rates as are agreed upon by the Service Provider and the
10 District prior to use of the equipment, except that in no case shall such
11 agreed hourly rate exceed the rental rates of established distributors or
12 equipment rental agencies serving the area, plus 33 1/3% for the cost of
13 fuel, oil, lubrication, and field repairs and maintenance.

14 d. *Other Items.* The District may authorize other items which may be
15 required on the work. Such items include labor, services, material and
16 equipment which are not ordinarily used for flood emergency work or may
17 not generally be available from the Service Provider or its Subcontractors.
18 The Service Provider shall submit invoices covering such items in detail to
19 the District.

20

1 e. *Mark-up.* The following percentages shall be added to the Service
 2 Provider's costs and shall constitute the markup for all overhead and
 3 profits.

4		
5	Labor	20 %
6	Materials	15 %
7	Equipment	15 %
8	Other Items	15 %
9		

10 Work performed by Subcontractors to the main Service Provider(s) shall
 11 include an additional mark-up of 10% for the first \$10,000 of work
 12 performed and 5% on work in excess of \$10,000.

13 f. *Timing.* Subject to a 25% retention amount, the District shall pay
 14 itemized invoices within 30 days of the District's receipt of an itemized
 15 invoice from the Service Provider meeting the reasonable satisfaction of
 16 the District's General Manager. The District shall pay the retention
 17 amount within an additional 30 days.

18 6. *Indemnification.* Except for damage or loss resulting from willful misconduct,
 19 gross negligence, or breach of this Agreement, no Party, nor its members,
 20 directors, officers, shareholders, or employees or affiliated companies shall be
 21 liable to any other Party for any loss or damage in connection with this
 22 Agreement. Each Party shall be responsible for the consequences of its own
 23 willful misconduct, gross negligence, and breach of this Agreement in connection
 24 with any work undertaken in accordance with this Agreement. Each Party shall
 25 indemnify, defend and hold harmless the other Party, and their respective
 26 members, directors, officers and employees, from the consequences of any such
 27 willful misconduct, gross negligence, and breach of this Agreement, to the extent
 28 permitted by law. In the case of joint or concurrent negligence or other

1 responsibility, each Party shall bear the loss in accordance with the requirements
2 of applicable California law.

3 7. *Insurance.* The Service Provider shall, within thirty days of the effective date of
4 this Agreement, furnish the District with: (1) a certificate of insurance
5 countersigned by an authorized agent or representative of the insurance company
6 that the insurance policies will not be canceled or materially changed without
7 thirty days' prior written notice to the District and that the policy or policies do
8 not exclude coverage for contractual liability, and (2) an endorsement to the
9 General Liability Policy, in the form of a CG2010, or such other form reasonably
10 acceptable to the District, confirming that the District and/or any of the affiliates
11 and additional entities of the District that the District may designate, are named by
12 mutual agreement as additional insureds by endorsement on such policies. In the
13 event of cancellation for non-payment of premiums by the Service Provider, the
14 District may pay such premiums and deduct the paid payment from amounts then
15 or subsequently owing to the Service Provider hereunder.

16 a. *General Liability Insurance.* The Service Provider agrees to carry general
17 liability insurance which has limits of liability not less than the following:

18	Bodily Injury:	\$2,000,000 each occurrence
19		\$2,000,000 each person
20		\$2,000,000 aggregate
21	Property Damage:	\$2,000,000 each occurrence
22		\$2,000,000 aggregate
23	Comprehensive Automobile Liability, for all	
24	vehicles, automobiles, trucks, and equipment:	
25		\$1,000,000 each occurrence
26		\$1,000,000 each person
27	Property Damage:	\$2,000,000 each occurrence
28		

29 b. *Workers' Compensation and Employer's Liability Insurance.* The Service
30 Provider agrees to provide workers' compensation insurance or qualified
31 self-insurance as required by law for the Service Provider's employees and

- 1 agents, and agrees to hold harmless and indemnify the District for any and
2 all claims arising out of injury, disability, or death of the Service
3 Provider's employees and/or agents. The Service Provider agrees to carry
4 employer liability insurance in the sum of not less than \$2,000,000.
- 5 c. *Excess Insurance.* In addition, the Service Provider shall procure no later
6 than the periods for procuring general liability insurance, a follow-form
7 excess insurance policy with minimum limits of \$8,000,000 for bodily
8 injury, property damage, and automobile liability.
- 9 d. *Rating.* All of the foregoing coverages shall be provided by an insurer
10 with an A.M. Best's rating of at least A-, VII or equivalent or as otherwise
11 approved by the District.
- 12 8. *Books and Records.* During the term of this Agreement and for four years
13 thereafter, each Party shall have access to and the right to examine any of the
14 other Party's pertinent books, documents, papers or other records (including,
15 without limitation, records contained on electronic media) relating to the
16 performance of that Party's obligations pursuant to this Agreement. The Parties
17 shall each retain all such books, documents, papers or other records for such
18 period. Access to each Party's books and records shall be during normal business
19 hours only. Nothing in this paragraph shall be construed to operate as a waiver of
20 any applicable privileges.
- 21 9. *Disputes.* The Parties recognize that, during the term of this Agreement, there
22 may be disputes regarding the obligations of the Parties or the interpretation of
23 this Agreement. The Parties agree that, prior to commencing any litigation, they
24 will promptly attempt to resolve disputes using a mediator, experienced in
25 construction or water-related disputes, to attempt to resolve the dispute. Each
26 party shall be represented at the mediation by a person with the rank of trustee,

1 vice-president, or senior-level manager (or higher). The costs of the mediation
2 shall be divided evenly between the Parties.

3 10. *Termination.* Either Party may terminate this Agreement for cause if it believes
4 that the other Party has violated the terms of this Agreement. In addition, the
5 Parties may terminate this Agreement without cause as follows:

6 a. *Termination With Cause.* Either Party may terminate this Agreement for
7 cause ten days after providing the other Party with a written notice of
8 default and the opportunity to cure the alleged default. Such notice of
9 default shall include a written statement describing all facts that the Party
10 believes constitute a default under this Agreement. The Parties agree to
11 promptly mediate any disputes arising from or relating to a termination of
12 this Agreements based on an alleged default by one or both Parties in the
13 manner described in paragraph 9 above. If the District chooses, it may
14 terminate this Agreement for cause during the flood season, as defined in
15 paragraph 2 above, effective on any date from November 1 to the
16 succeeding May 1.

17 b. *Termination Without Cause.* The District may terminate this Agreement
18 as to the Service Provider at any time, without cause, upon thirty days'
19 notice to the Service Provider(s) in question. The Service Provider may
20 terminate this Agreement, without cause, at any time between each April
21 15 and August 1 upon thirty days' notice to the District. The Service
22 Provider expressly agrees that it may not terminate this Agreement
23 without cause between each August 1 and each April 15. If the District
24 chooses, it may terminate this Agreement without cause during the flood
25 season, as defined in paragraph 2 above, effective on any date from
26 November 1 to the succeeding May 1.

1 c. *Survival of Obligations.* The District’s obligation to pay for services
2 rendered, at its request under this Agreement and all indemnity obligations
3 under this Agreement shall survive the termination of this Agreement,
4 with or without cause. In all other cases, no obligations created by this
5 Agreement shall survive the termination of this Agreement.

6 11. *General Provisions*

7 a. *Jurisdiction and Venue.* The Parties agree that any litigation involving the
8 construction of this Agreement shall be brought in the Superior Court of
9 Sacramento County.

10 b. *Authority.* Each signatory of this Agreement represents the s/he is
11 authorized to execute this Agreement on behalf of one of the Parties to this
12 Agreement. Each Party represents that it has legal authority to enter into
13 this Agreement and to perform all obligations under this Agreement.

14 c. *Amendment.* This Agreement may be amended or modified only by a
15 written instrument executed by each of the Parties to this Agreement.

16 d. *Headings.* The paragraph headings used in this Agreement are intended
17 for convenience only and shall not be used in interpreting this Agreement
18 or in determining any of the rights or obligations of the Parties to this
19 Agreement.

20 e. *Construction and Interpretation.* This Agreement has been arrived at
21 through negotiations and each Party has had a full and fair opportunity to
22 revise the terms of this Agreement. As a result, the normal rule of
23 construction that any ambiguities are to be resolved against the drafting
24 Party shall not apply in the construction or interpretation of this
25 Agreement.

- 1 f. *Waiver.* No waiver of any violation or breach of this Agreement shall be
2 considered to be a waiver or breach of any other violation or breach of this
3 Agreement, and forbearance to enforce one or more of the remedies
4 provided in this Agreement shall not be deemed to be a waiver of that
5 remedy.
- 6 g. *Attorneys' Fees and Costs.* The prevailing Party in any litigation or other
7 action to enforce or interpret this Agreement shall be entitled to reasonable
8 attorneys' fees, expert witnesses' fees, costs of suit, and other and
9 necessary disbursements in addition to any other relief.
- 10 h. *Entire Agreement.* This Agreement constitutes the entire agreement of the
11 Parties with respect to the subject matter of this Agreement and supersedes
12 any prior oral or written agreement, understanding, or representation
13 relating to the subject matter of this Agreement.
- 14 i. *Successors and Assigns.* This Agreement shall be binding on the inure to
15 the benefit of the successors and assigns of the respective Parties to this
16 Agreement. No Party may assign its interests in or obligations under this
17 Agreement without the written consent of the other Parties, which consent
18 shall not be unreasonably withheld or delayed.
- 19 j. *Partial Invalidity.* If, after the date of execution of this Agreement, any
20 provision of this Agreement is held to be illegal, invalid, or unenforceable
21 under present or future laws effective during the term of this Agreement,
22 such provision shall be fully severable. However, in lieu thereof, there
23 shall be added a provision as similar in terms to such illegal, invalid or
24 unenforceable provision as may be possible and be legal, valid and
25 enforceable.

- 1 k. *Necessary Actions.* Each Party agrees to execute and deliver additional
2 documents and instruments and to take any additional actions as may be
3 reasonably required to carry out the proposes of this Agreement.
- 4 l. *Compliance with Law.* In performing their respective obligations under
5 this Agreement, the Parties shall endeavor to comply with and conform to
6 all applicable laws, rules, regulations and ordinances to the extent that
7 such laws, rules, and regulations are known and understood to be
8 applicable under emergency circumstances.
- 9 m. *Third Party Beneficiaries.* This Agreement shall not create any right or
10 interest in any non-Party or in any member of the public as a third party
11 beneficiary.
- 12 n. *Counterparts.* This Agreement may be executed in one or more
13 counterparts, each of which shall be deemed an original.
- 14 o. *Notices.* All notices, requests, demands or other communications required
15 or permitted under this Agreement shall be in writing unless provided
16 otherwise in this Agreement and shall be deemed to have been duly given
17 and received on: (i) the date of service if served personally or served by
18 facsimile transmission on the Party to whom notice is to be given at the
19 address(es) provided below, (ii) on the first business day after mailing, if
20 mailed by Federal Express, U.S. Express Mail, or other similar overnight
21 courier service, postage prepaid, and addressed as provided below, or (iii)
22 on the third day after mailing if mailed to the Party to whom notice is to be
23 given by first class mail, registered or certified, postage prepaid, addressed
24 as follows:

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To the District:

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Tim Kerr
General Manager
185 Commerce Circle
Sacramento, California 95815
Telephone: (916) 929-4006
Cell Phone: (916) 417-4161
Facsimile: (916) 929-4160

With a copy to:

David Aladjem
Downey Brand Attorneys LLP
621 Capitol Mall, 18th Floor
Sacramento, California 95814
Telephone: (916) 444-1000
Facsimile: (916) 444-2100

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American River Flood Control District

Nordic Industries Inc

By: Brian Holloway
President, Board of Trustees

By:
Title

Approved as to form only:

Approved as to form only:

By: David R.E. Aladjem
District Counsel

By: