

REQUIREMENTS AGREEMENT
C-09-200-11-03

THIS AGREEMENT (the "Agreement") is entered into effective as of by and between **Ergon Asphalt & Emulsions, Inc.**, a TEXAS Company ("Seller") and **HIDALGO COUNTY** ("Buyer").

WHEREAS, Buyer has solicited proposals for the supply of its requirements of Hidalgo County "**CRS-2 (Cationic Rapid Setting) Emulsified Asphalt,**" as further described in Exhibit "A" which is attached hereto and incorporated herein by reference for all purposes (the "Products") for a period of one year; and

WHEREAS, Seller has submitted a proposal to supply Buyer's requirements; and

WHEREAS, Buyer has determined that Seller has submitted the lowest and best bid to meet Buyer's requirements for the Product.

NOW THEREFORE, for and in consideration of the mutual covenants and conditions hereinafter set forth, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereto agree as follows:

1. Buyer agrees to purchase from Seller, and Seller agrees to sell to Buyer, all of the Products that Buyer may require for use by Buyer in "**CRS-(Cationic Rapid Setting) Emulsified Asphalt;**" in the areas of **HIDALGO COUNTY** projects for a period of December 15, 2009 from June 14, 2010 with the option to renew for an additional one (1) six (6) months terms, under the same rates, terms, and condition, and it is agreed that the Products will meet the specifications set forth in Exhibit "A" hereto.

2. When Buyer determines that it needs a quantity of the Products to be delivered, it will, according to its Purchasing Policies, complete and submit to Seller a Purchase Order describing the type and quantity of the Products required. The Products are to be delivered by Buyer to the location in Hidalgo County specified by Buyer in its Purchase Order.

3. Buyer agrees to pay Seller for each Purchase Order based on the prices set out in Exhibit "B". Seller shall render invoices for each Purchase Order, and the invoices shall be paid by Buyer on or before the 30th day following receipt of the invoice.

4. County may terminate this contract upon thirty (30) days written notice at any time for any reason or no reason at all.

5. General Provisions.

a. **Conflict with Applicable Law.** Nothing in this Agreement shall be construed so as to require the commission of any act contrary to law, and whenever there is any conflict between any provision of this Agreement and any present or future law, ordinance or administrative, executive or judicial regulation, order or decree, or amendment thereof, contrary to which the parties have no legal right to contract, the latter shall prevail, but in such event the affected provision or provisions of this Agreement shall be modified only to the extent necessary to bring them within the legal requirements and only during the time such conflict exists.

b. **No Waiver.** No waiver by Buyer of any breach of any provision of this Agreement shall be deemed to be a waiver of any preceding or succeeding breach of the

same or any other provision hereof.

c. **Entire Agreement.** This Agreement contains the entire contract between the parties hereto, and each party acknowledges that neither has made (either directly or through any agent or representative) any representations or agreements in connection with this Agreement not specifically set forth herein. This Agreement may be modified or amended only by agreement in writing executed by Buyer and Seller, and not otherwise.

d. **Texas Law to Apply.** This Agreement shall be construed under and in accordance with the laws of the State of Texas, and all obligations of the parties created hereunder are performable in Hidalgo County, Texas. The parties hereby consent to personal jurisdiction in Hidalgo County, Texas.

e. **Notice.** Except as may be otherwise specifically provided in this Agreement, all notices, demands, requests or communications required or permitted hereunder shall be in writing and shall either be (i) personally delivered against a written receipt, or (ii) sent by registered or certified mail, return receipt requested, postage prepaid and addressed to the parties at the addresses set forth below, or at such other addresses as may have been theretofore specified by written notice delivered in accordance herewith:

If to Buyer: Hidalgo County
 Attention: County Judge
 100 E. Cano, 2nd Floor
 Edinburg, Texas 78539

If to Seller: Ergon Asphalt & Emulsions, Inc.
 Attn: RM McKemie, Vice President, Marketing
 11612 RM 2244, Building 1, Suite 250
 Austin, TX 78738

Each notice, demand, request or communication which shall be delivered or mailed in the manner described above shall be deemed sufficiently given for all purposes at such time as it is personally delivered to the addressee or, if mailed, at such time as it is deposited in the United States mail.

f. **Additional Documents.** The parties hereto covenant and agree that they will execute such other and further instruments and documents as are or may become necessary or convenient to effectuate and carry out the terms of this Agreement.

g. **Successors.** This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, executors, administrators, legal representatives, successors, and assigns where permitted by this Agreement.

h. **Assignment.** This Agreement shall not be assignable.

i. **Headings.** The headings and captions contained in this Agreement are solely for convenient reference and shall not be deemed to affect the meaning or interpretation of any provision or paragraph hereof.

j. **Gender and Number.** All pronouns used in this Agreement shall include the other gender, whether used in the masculine, feminine or neuter gender, and the singular shall include the plural whenever and as often as may be appropriate

k. **Authority to Execute.** The execution and performance of this Agreement by

Buyer and Seller have been duly authorized by all necessary laws, resolutions or corporate action, and this Agreement constitutes the valid and enforceable obligations of Buyer and Seller in accordance with its terms.

l. Commitment of Current Revenues Only. In the event that, during any term hereof, the Commissioners Court does not appropriate sufficient funds to meet the obligations of Buyer under this Agreement, Buyer may terminate this Agreement upon sixty (60) days written notice to Seller. Buyer agrees, however, to use reasonable efforts to secure funds necessary for the continued performance of this Agreement. The parties intend this provision to be a continuing right to terminate this Agreement at the expiration of each budget period of Buyer pursuant to the provisions of Tex. Loc. Govt. Code Ann. § 271.903 (Vernon Supp. 1996).

Insurance. Company shall provide insurance in force on all its vehicles and all persons connected with providing services under this Contract naming County as an additional insured (with coverages and in the amounts described on Exhibit "C" attached hereto and incorporated herein at this point for all purposes), and shall furnish to County certificates of such insurance coverage.

n. Purchasing Ethics. Seller represents and warrants it has not, during the process of being awarded this contract violated the following ethical standards of Buyer and, upon and after the execution of this Agreement, agrees to abide by the following ethical standards of Buyer:

(1) It shall be a breach of ethics to offer, give or agree to give any elected official, department head or employee, or former elected official, department head or employee, of Hidalgo County, or for any elected official, department head or employee or former elected official, department head or employee of Hidalgo County, to solicit, demand, accept or agree to accept from another person, entity or organization, a gratuity or an officer of employment in connection with any decision, approval, disapproval, recommendation, preparation or any part of a program requirement or purchase request, influencing the content of any specification or procurement standard, rendering of advise, investigation, auditing, or in any other advisory capacity in any proceeding or application, request for ruling, determination, claim or controversy, or other particular matter pertaining to any program requirement or a contract or subcontract, or to any solicitation or proposal therefor pending before any department or agency of Hidalgo County.

(2) It shall be a breach of ethics for any payment, gratuity or offer of employment to be made by or on behalf of a subcontractor under a contract to the prime contractor or higher tier subcontractor for any contract for Hidalgo County, or any person associated therewith, as an inducement for the award of a subcontract or order.

EXECUTED effective as of the day and year first above written.

APPROVED BY COMMISSIONERS COURT ON, April 7, 2009

HIDALGO COUNTY

Ergon Asphalt & Emulsions, Inc.

By: _____

Printed Name: _____

Title: _____

ATTEST:

Arturo Guajardo, Jr., County Clerk

**APPROVED AS TO FORM:
Atlas & Hall, L.L.P**

By: _____

Date: _____

**EXHIBIT “A”
SPECIFICATIONS**

EXHIBIT "A"
HIDALGO COUNTY (ALL FUNDING SOURCES)
"CRS-2 (CATIONIC RAPID SETTING) EMULSIFIED ASPHALT"
BID NO.: 2009-200-09-09-SGS

1. SPECIFICATIONS:

INFORMATION/ INSTRUCTIONS TO BIDDERS:

The purchase of **CRS-2 (CATIONIC RAPID SETTING) EMULSIFIED ASPHALT** will be only on an **"As Needed Basis"** by Hidalgo County, (all funding sources, i.e. CIP, CAP and R&B).

- **MATERIAL:** CRS-2 (CATIONIC RAPID SETTING) EMULSIFIED ASPHALT
- **INCREMENTS:** BID PRICE SHOULD BE IN INCREMENTS OF 1,000 UP TO 5,000 GALLONS
- **SPECIAL CONDITIONS:** BID PRICE BY THE GALLON (FREIGHT TO BE INCLUDED). VENDOR MUST SUPPLY PUMP AND HOSE (FOR UNLOADING).

LOCATIONS, CONTACTS AND DELIVERY INSTRUCTIONS:

PRECINCT NO. 1	PRECINCT NO. 2	PRECINCT NO. 3	PRECINCT NO. 4
MILE 11 N. and 1 ½ miles W. from FM 1015 Sunrise Hill Park Weslaco, TX. 78596	301 E. State Pharr, TX. 78577	7 Mile line and Iowa Rd. Mission, TX. 78572	1102 N. Doolittle Edinburg, TX. 78541
CONTACT:	CONTACT:	CONTACT:	CONTACT:
Joseph Palacios, Chief Administrator (956) 968-8733	Ricardo Cuellar, Field Operations Director (956) 787-1891	Saul Ramirez, Field Operations Director (956) 585-4509	Juan Carranza, Chief Administrator (956) 383-3112

- Delivery hours will be arranged with the Precincts when requiring **CRS-2 (CATIONIC RAPID SETTING) EMULSIFIED ASPHALT**. Hidalgo County reserves the right to add or delete locations (pits) throughout the contract term.

2. TERMS & CONDITION:

1. The contract term will be for a period of six (6) months with County's option to extend the contract for additional six (6) months based on performance, evaluation and contingent upon terms, conditions and cost remaining unchanged, and/or sixty (60) day grace period at the end of the contract for unforeseen delays on subsequent contract award. It is agreed and understood that Hidalgo County will purchase no more material than is needed. Prices must remain firm during the contract period unless modifications are agreed and approved by Hidalgo County Commissioner's Court.
2. County reserves the right to reject any/all bids, to waive any/all formalities or technicalities, or to accept the bid considered the best and most advantageous to the County.

EXHIBIT "A"
HIDALGO COUNTY (ALL FUNDING SOURCES)
"CRS-2 (CATIONIC RAPID SETTING) EMULSIFIED ASPHALT"
BID NO.: 2009-200-09-09-SGS

3. Hidalgo County reserves the right to award the bid to ONE or MULTIPLE bidders, if the County determines it is in the best interest of the County to do so.
4. The Contract for the material shall remain in effect until a) contract expires, b) delivery/completion of services ordered , c) terminated by either party with a thirty (30) day written notice prior to any cancellation. The successful bidder must state in writing the reasons for such cancellation. Hidalgo County reserves the right to award canceled contract to next lowest bidder as it deems to be in the best interest of the County.
5. Insurance requirements must be met and a copy of the Certificate of Insurance (Acord form) must be submitted to the Purchasing Department prior to any services being performed by the awarded bidder. Insurance requirements for this project to be maintained throughout the contract term.(refer to insurance requirements in ("Exhibit C"))
6. Continuing non-performance of the bidder in terms of specifications shall be basis for the termination of the contract by the County. The County shall not pay for work, equipment, supplies or services which are unsatisfactory. Vendors will be given a reasonable opportunity before termination to correct the deficiencies.
7. In the event the material furnished does not meet the County's requirements (regardless of weather, test acceptability, method of repair or other conditions), the County reserves the option to require the material supplier to replace or to reimburse the County for unused portion of material found to be unsatisfactory.
8. Hidalgo County reserves the right to seek purchases for **"CRS-2 (Cationic Rapid Setting) Emulsified Asphalt"** from state awarded venders, whenever it is in the best interest of the County to do so.
9. All cost and expenses associated with the preparation and submission of (bids, proposals and/or quotes) shall be the responsibility of the bidder and no reimbursements for such charges or expenses shall be passed onto Hidalgo County.
10. Bidder(s) have been in business for as least two (2) years.
11. Hidalgo County reserves the right to hold bids for a period of ninety (90) days without taking any action.
12. Bidder(s) agrees that to the extent an item is unavailable from Bidders(s) own inventory, Bidder(s) will be responsible for locating an alternative supplier and for providing the product or service to Hidalgo County.

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HIDALGO COUNTY (ALL FUNDING SOURCES)
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REQUIREMENTS:

- The successful bidder shall not deliver products or provide services without a Hidalgo County Purchase Order, signed by an authorized agent of the Hidalgo County Purchasing Department.
- The successful bidder agrees to abide by all applicable state laws, regulations and be in compliance with all OSHA rules and requirements.
- Bidder will provide all labor, machinery and equipment, tools and materials required to render services.

MARKET VOLATILITY AND UNIT PRICE ADJUSTMENTS:

Hidalgo County recognizes that during periods of national crisis and unstable economic conditions, unforeseen price increases might affect costs for goods and services contracted on an annual basis. The following procedure may be employed to mediate price volatility:

- 1) **Requesting Price Adjustment:** Upon written request of the Vendor to the County Purchasing Agent, the County may review evidence of prevailing industry-wide market conditions that warrant an adjustment in bid prices contained in the contract.
 - A Vendor must tie any price change clause to an industry-wide or otherwise nationally recognized index, or some other form of verifiable document. Such written request must be accompanied by a certified copy of the supplier's advisory or notification to the vendor of the price changes.
 - The Vendor must put the Purchasing Agent on the mailing lists for such publications so that the Purchasing Agent can monitor said changes. Such membership shall be at no cost to the County.
 - The County Purchasing Agent retains the right to determine whether or not such proposed price changes are in the best interest of the County.
 - No price escalation will be authorized in excess of the amount of the increase referred to in the supplier's notice.
 - The County may only grant a price increase if the evidence presented is deemed reliable. Should the County allow a price increase, the approved price change shall be honored for all orders received by the vendor or contractor after the effective date of such price change. Approved price changes are not applicable to orders already issued and in process at time of price change.
- 2) **Price Reduction:** Vendor shall notify the County at the time when the Vendor's costs for items and/or supplies reduce due to stabilization in the market at which time prices for items on this contract shall be reduced accordingly. Failure by the Vendor to notify the County of a decrease in costs for items and/or supplies for which the Vendor was granted a price adjustment, may result in immediate termination of this contract and the County shall not be obligated to pay the Vendor the difference between the contract price and the price adjustment.

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- 3) **Timeframe for Adjusted Price Increases:** Price increases are only valid for the quarter in which they are requested and approved. Prices shall return to the original contract price at the beginning of the following quarter unless a Vendor notifies the County in writing within ten (10) days of expiration of the quarter in which the price increase is in effect, that it desires to have the price increase continue or that the Vendor is requesting a different price increase for the following quarter. Such request must be supplemented with sufficient justification to demonstrate that the price increase remains necessary. The County Purchasing Department shall have sole discretion whether to grant the price increase extension. The County too, shall have discretion to unilaterally reduce, eliminate or extend a price adjustment to the Vendor at any time upon written notice from the County to the Vendor demonstrating justification for such reduction, elimination or extension of the price adjustment.

- 4) **Allowable Review Periods:** Price adjustment reviews may only be requested by the Vendor on a quarterly basis. However, the County may at its own discretion, conduct temporary price adjustment reviews at any time. The County Purchasing Agent and/or the County Auditor reserve the right to audit and/or examine any pertinent books, documents, papers, records or invoices relating directly to the contract transaction in question after reasonable notice and during normal business hours.

- 5) **Dollar Limit to Price Changes:** The total increase in contract price shall not exceed twenty-five percent (25%) of the original contract price during the contract term.

Further information required for this project can be addressed to, Sandy Suarez, Buyer, Hidalgo County Purchasing Department (956) 318-2626. Hidalgo County is requesting that any and all questions, inquiries, and clarifications regarding quotes, bids, proposals, or statement of qualifications be addressed to: Martha L. Salazar, Purchasing Agent, 2812 S. Business Highway 281, Edinburg, Texas 78539. **TELEPHONE INQUIRIES WILL NOT BE ACCEPTED.**

ALL WRITTEN INQUIRIES WILL BE ACCEPTED VIA FACSIMILE (956)318-2629 or (956)292-7612 OR VIA E-MAIL TO: sandy.suarez@co.hidalgo.tx.us by NO LATER THAN, WEDNESDAY, SEPTEMBER 02, 2009 by 5:00 P.M. Responses will be sent to all applicants via e-mail by no later than, FRIDAY, SEPTMEBER 04, 2009 by 5:00 P.M.

**EXHIBIT “B”
PAYMENT SCHEDULE**