

REQUIREMENTS AGREEMENT

C-09-075-04-07

THIS AGREEMENT (the "Agreement") is entered into effective as of by and between **Dubose Interests, LLC dba Performance Grade Asphalt, LLC**, a **TEXAS Company** ("Seller") and **HIDALGO COUNTY** ("Buyer").

WHEREAS, Buyer has solicited proposals for the supply of its requirements of Hidalgo County "**MS-1 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 "**MS-1 Emulsified Asphalt**" in the areas of **HIDALGO COUNTY** projects for a period of June 13, 2009 from December 12, 2009 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: Performance Grade Asphalt, LLC
Attention: Clarke DuBose
PO Box 6
Hitchcock, TX 77563

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

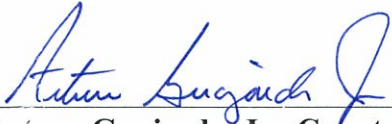

Juan D. Salinas, III, County Judge

**DuBose Interest, LLC dba Performance
Grade Asphalt, LLC**

By: 

Printed Name: Clarke DuBose
Title: President


ATTEST:



Arturo Guajardo, Jr., County Clerk

APPROVED AS TO FORM:

Atlas & Hall, L.L.P

By: 

Date: 5-14-09

**EXHIBIT “A”
SPECIFICATIONS**

Exhibit "A"

Hidalgo County (For all Hidalgo County funding sources, programs and entities)

MS-1 Emulsified Asphalt

Bid No 2009-075-03-25-YZV

I SPECIFICATIONS:

MS-1 – Emulsified Asphalt

Material – bid price by the gallon delivered by vendor:

II TERMS AND CONDITIONS:

1. LOCATIONS/DELIVERY INSTRUCTIONS:

All deliveries will be made to the address(es) specified on the purchase order during normal working hours of 8:00 a.m. to 4:00 p.m., Monday through Friday, unless otherwise authorized by the user department.

a) Precinct #1 – Sunrise Hill Mile 11 North 1 ½ East of 1015, Mercedes, Texas

b) Precinct #2- does not have storage facilities but will make arrangements with other county precincts' for temporary storage.

c) Precinct #3- 7 Mile Line & Iowa Road

d) Precinct #4 – 1102 North Doolittle, Edinburg, Texas

All delivery charges – freight, inside delivery, and all costs associated with this purchase are included in bid proposal. Delivery and service will be F.O.B. all charges for assembly, installation and set-up shall be included in the bid price. Unless otherwise stated, assembly, installation and set-up will be required.

2. QUANTITY:

Hidalgo County will purchase material "ON AN AS NEEDED BASIS ONLY". Thus it is agreed and understood that the County will purchase no more material than is needed.

3. CONTRACT TERM:

Option 1 – The term for the purchase of MS-1 Emulsion Asphalt required by Hidalgo County will be for three (3) months with h the County's sole discretion to extend the contract for an additional 3three (3) –three (3) month terms and contingent upon cost to remain unchanged and awarded vendor(s) to supply and deliver to Hidalgo County location(s) upon meeting all required insurances.

Option 2 – The term for the purchase of MS-1 Emulsion Asphalt required by Hidalgo County will be for six (6) months with the County's sole discretion to extend the contract for an additional one (1) six (6) month term and contingent

upon cost to remain unchanged and awarded vendor(s) to supply and deliver to Hidalgo County location(s) upon meeting all required insurances.

The contract shall remain in effect until contract expires, delivery/completion of services ordered or terminated by Hidalgo County within a thirty (30) day written notice prior to cancellation. The successful bidder must state therein 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

4. PRODUCT QUALITY:

To insure the highest product quality, Hidalgo County reserves the right to request from vendor(s) the current TxDOT approval batch number for the testing of material.

5. VENDORS PERFORMANCE:

Hidalgo County reserves the right to enforce the performance for this contract in any manner prescribed by law or deemed to be in the best interest of the county in the event of breach or default of this contract. Non-Performance of the bidder in terms of specifications and/or requirements shall be a basis for the termination of the contract by the County.

6. DEFAULT:

The County shall not pay for work, equipment, services or supplies which are unsatisfactory. Contractor may be given a reasonable opportunity twenty-four (24) hours prior to termination to correct any deficiency. This however shall in no way be construed as negating the basis for termination for non-performance.

Bidder(s) agree(s) that in the event "MS-1 Emulsified Asphalt" is unavailable from bidder(s) own inventory, bidder(s) will be responsible for locating an alternative supplier and for providing the product to Hidalgo County at the same rates/fees, terms and conditions. After the bid is awarded and in the event the awarded bidder(s) cannot provide "MS-1 Emulsified Asphalt" to Hidalgo County, HIDALGO COUNTY will seek goods/services from the next compliant vendor or other sources and will charge the successful bidder the difference for any additional cost incurred by Hidalgo County for such item.

7. TERMINATION:

Termination in whole or part, by the county may be made at its option and without prejudice to any other remedy to which it may be entitled at law or in equity, or elsewhere under this contract, by giving thirty (3) days written notice to the Contract with the understanding that all work being performed under this contract shall cease upon the date specified in such notice.

8. BID AWARD:

a) Option 1 – The term for the purchase of "MS-1 Emulsion Asphalt" required by Hidalgo County will be for three (3) months with the County's sole discretion to extend the contract for an additional three (3) three (3) months terms and contingent upon cost to remain unchanged and awarded vendor(s) to supply and deliver to Hidalgo County location(s) upon meeting all required insurances.

Option 2 - The term for the purchase of MS-1 Emulsion Asphalt required by Hidalgo County will be for Six (6) months with the County's sole discretion to extend the contract for an additional one (1) six (6) month term and contingent upon cost to remain unchanged and warded vendor(s) to supply and deliver to Hidalgo County locations(s) upon meeting all required insurances.

- b) Hidalgo 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.
- c) Hidalgo County reserves the right to award to one or more bidders whichever is in the best interest of the County.
- d) The contract for the material shall remain in effect until contract expires, delivery/completion of services ordered or terminated by either party with a thirty (30) day written notice prior to any cancellation. The successful bidder must state herein 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.
- e) Insurance certificates as per "exhibit C" must be submitted to the Purchasing Department prior to any services being performed by the awarded bidder.
- f) In the event the material furnished does not meet the entire County's requirement (regardless of weather, test's 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.

9. **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:

- a) 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.
 - i. 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.
 - ii. 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.
 - iii. The County Purchasing Agent retains the right to determine whether or not such proposed price changes are in the best interest of the County.
 - iv. No price escalation will be authorized in excess of the amount of the increase referred to in the supplier's notice.
 - v. 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.

- b) 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 both be obligated to pay the Vendor the difference between the contract price and the price adjustment.
- c) Time frame 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 then (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.
- d) 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.
- e) 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.

ADDITIONAL INFORMATION:

Hidalgo County is requesting that any and all questions, inquiries, and clarifications regarding quotes, bids, proposals, or statements of qualifications be addressed to, Martha L. Salazar, CPPB, Purchasing Agent, 2802 South Business Hwy 281, Edinburg, Texas 78539. **TELEPHONE INQUIRIES WILL NOT BE ACCEPTED. ALL WRITTEN INQUIRES WILL BE ACCEPTED VIA FACSIMILE OR EMAILED TO: yolanda.velasquez@co.hidalgo.tx.us** NO LATER THAN, Wednesday, March 18, 2009 5:00 p.m. Responses will be sent to all applicants via facsimile by no later than, 5:00 p.m., Friday, March 20, 2009.

EXHIBIT "B"
PAYMENT SCHEDULE

HIDALGO COUNTY

(Including all funding sources, programs, and entities)

"MS-1 EMULSIFIED ASPHALT"

BID NO 2009-075-03-25-YZV

BID PAGE

Option 1: The term for the purchase of MS-1 Emulsion Asphalt required by Hidalgo County will be for three (3) month with County's sole discretion to extend the contract for an additional three (3) month terms and contingent upon cost to remain unchanged and awarded vendor(s) to supply and deliver to Hidalgo County location(s) upon meeting all required insurances.

PRICE PER GALLON (DELIVERED) MUST INCLUDE ANY/ALL PUMP, HOSE AND FREIGHT FEES (IF ANY)	DEMMURAGE CHARGE: WILL COMMENCE TWO (2) HOURS AFTER ARRIVAL
LOADS OF 5,000 GALLONS OR MORE \$ <u>2.20</u> /gal. Cost are to be net F.O.B., County Prepaid	\$ <u>50.00</u> Hour
LOADS OF 4,000 - 4,999 GALLONS \$ <u>2.30</u> /gal. Cost are to be net F.O.B., County Prepaid	\$ <u>50.00</u> Hour
LOADS OF 3,000 - 3,999 GALLONS \$ <u>2.50</u> /gal. Cost are to be net F.O.B., County Prepaid	\$ <u>50.00</u> Hour
LOADS OF 2,000 - 2,999 GALLONS \$ <u>2.75</u> /gal. Cost are to be net F.O.B., County Prepaid	\$ <u>50.00</u> Hour
LOADS OF 1,000 - 1,999 GALLONS \$ <u>3.00</u> /gal. Cost are to be net F.O.B., County Prepaid	\$ <u>50.00</u> Hour


BIDDER/COMPANY NAME: Performance Grade Asphalt, L.L.C

ADDRESS: P.O. Box 6

CITY/STATE/ZIP CODE: Hitchcock, TX. 77563

PHONE NO: 409-986-7740 FAX NO: 409-986-7950

CELLULAR NO: 281-387-9869

AUTHORIZED SIGNATURE: 

PRINTER NAME: Clarke DuBose DATE 03/23/09

TITLE: President

**EXHIBIT “C”
INSURANCE REQUIREMENTS**

ACORD™ CERTIFICATE OF LIABILITY INSURANCE

DATE (MM/DD/YYYY)
2/11/2009

PRODUCER (409) 934-8000 FAX: (409) 935-1883
Rust, Ewing, Watt & Haney, Inc.
7900 Emmett Lowry Expressway

THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW.

Texas City TX 77591

INSURERS AFFORDING COVERAGE NAIC #

INSURED
Dubose Interests, LLC, DBA: Performance Grade
P. O. Box 6

INSURER A: American Intern Splty/AIG 26883

INSURER B: Commerce&Industry Ins/AIG 19410

INSURER C: Texas Mutual Insurance 22945

INSURER D:

INSURER E:

Hitchcock TX 77563

COVERAGES

THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED. NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. AGGREGATE LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.

INSR/ADD'L LTR/INSRD	TYPE OF INSURANCE	POLICY NUMBER	POLICY EFFECTIVE DATE (MM/DD/YY)	POLICY EXPIRATION DATE (MM/DD/YY)	LIMITS
A	GENERAL LIABILITY <input checked="" type="checkbox"/> COMMERCIAL GENERAL LIABILITY CLAIMS MADE <input checked="" type="checkbox"/> OCCUR	EG 13320367	11/20/2008	11/20/2009	EACH OCCURRENCE \$ 1,000,000
	DAMAGE TO RENTED PREMISES (Ea occurrence) \$ 50,000				
					MED EXP (Any one person) \$ 5,000
					PERSONAL & ADV INJURY \$ 1,000,000
					GENERAL AGGREGATE \$ 2,000,000
					PRODUCTS - COMP/OP AGG \$ 1,000,000
	GEN'L AGGREGATE LIMIT APPLIES PER <input checked="" type="checkbox"/> POLICY <input type="checkbox"/> PRO-JECT <input type="checkbox"/> LOC				
B	AUTOMOBILE LIABILITY <input checked="" type="checkbox"/> ANY AUTO	CA-529-54-42	11/20/2008	11/20/2009	COMBINED SINGLE LIMIT (Ea accident) \$ 1,000,000
	ALL OWNED AUTOS				BODILY INJURY (Per person) \$
	SCHEDULED AUTOS				BODILY INJURY (Per accident) \$
	HIRED AUTOS				PROPERTY DAMAGE (Per accident) \$
	NON-OWNED AUTOS				
	GARAGE LIABILITY <input type="checkbox"/> ANY AUTO				AUTO ONLY - EA ACCIDENT \$
					OTHER THAN EA ACC \$
					AUTO ONLY: AGG \$
	EXCESS/UMBRELLA LIABILITY <input type="checkbox"/> OCCUR <input type="checkbox"/> CLAIMS MADE				EACH OCCURRENCE \$
					AGGREGATE \$
					\$
					\$
					\$
C	WORKERS COMPENSATION AND EMPLOYERS' LIABILITY ANY PROPRIETOR/PARTNER/EXECUTIVE OFFICER/MEMBER EXCLUDED? If yes, describe under SPECIAL PROVISIONS below	TSF-0012106801	2/18/2009	2/18/2010	<input checked="" type="checkbox"/> WC STATU-TORY LIMITS <input type="checkbox"/> OTH-ER
	E L EACH ACCIDENT \$ 1,000,000				
	E L DISEASE - EA EMPLOYEE \$ 1,000,000				
	OTHER				E L DISEASE - POLICY LIMIT \$ 1,000,000

DESCRIPTION OF OPERATIONS/LOCATIONS/VEHICLES/EXCLUSIONS ADDED BY ENDORSEMENT/SPECIAL PROVISIONS
Blanket Additional Insured Applies to the Auto and Blanket Waiver of Subrogation applies to the Auto and Workers Compensation as required by written contract between the insured and certificate holder.

CERTIFICATE HOLDER

(956) 292-7612
County of Hidalgo
2812 S. Business 281
Edinburg, TX 78539

CANCELLATION

SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, THE ISSUING INSURER WILL ENDEAVOR TO MAIL 10 DAYS WRITTEN NOTICE TO THE CERTIFICATE HOLDER NAMED TO THE LEFT, BUT FAILURE TO DO SO SHALL IMPOSE NO OBLIGATION OR LIABILITY OF ANY KIND UPON THE INSURER, ITS AGENTS OR REPRESENTATIVES.

AUTHORIZED REPRESENTATIVE

J Blackshear Jr. CIC/ *Joe Blackshear Jr.*