

**MEMORANDUM OF AGREEMENT**  
**For Supply of Aeration Basins Diffusers Equipment**  
**Napa Sanitation District and Xylem Water Solutions USA, Inc.**

The purpose of this Memorandum of Agreement (MOA) is to document the agreement between the Napa Sanitation District (District) and Xylem Water Solutions USA, Inc. (Xylem) to supply the Aeration Basins Diffusers System for the Napa Sanitation District WRF Aeration Basins Diffusers Instrumentation and Controls Project (Project).

This MOA references other documents, which are considered integral parts of this MOA. All requirements embodied in the referenced documents are inseparable requirements of this MOA.

The District issued Wastewater Treatment Plant Request for Proposals, Aeration Basins Diffusers Equipment (RFP), which is incorporated herein by reference, to potential vendors and received proposals from Xylem and other Aeration Basins Diffusers Equipment Vendors. The proposals included the following components:

- General Contract Information
- Installation List and Reference Information
- Technical and Field Service Capabilities
- Replacement Parts Availability
- Equipment Support Commitment
- Requested Deviations from Terms, Agreement, and Specifications
- System Description and Design Criteria Drawings
- Bill of Material
- Price Proposal

These proposals were evaluated by the District based on factors presented in the RFP including experience, performance, quality of components, vendor support, operation and maintenance costs, and equipment cost. Based on these competitive proposals, the District selected Xylem's Aeration Basins Diffusers Equipment as the responsive system with the lowest up-front capital cost for the Project. Xylem was informed of their selection in a Notification Letter dated, March 30, 2016. This MOA is intended to create a binding commitment between Xylem and the District for acquisition of the Aeration Basins Diffusers System equipment by the District and installation by the District's Contractor pursuant to the terms of this MOA, subject to the limitations set forth herein.

## **AGREEMENT**

### **I. Duties of Vendor**

Xylem shall have the following duties under this agreement:

1. Provide final coordination with the District's Design Engineer in their completion of the final design of the aeration basins diffusers equipment system.
2. Provide equipment to the District in accordance with the RFP terms and documents, Xylem's proposal, and this MOA.

The terms and conditions offered shall be customary to California public works market place, to the extent the terms and conditions are not specifically addressed herein.

3. Prepare shop drawing submittals to the District's Engineer consistent with the RFP documents, this MOA and the Proposal. The submittals shall be delivered within approximately two (2) weeks after execution of the Agreement between the Aeration Basins Diffusers Equipment Vendor and District. Resubmittals, if any, shall be delivered to the District's Engineer within one (1) week of receipt of any review comments from the District. Submittals are to be approved no later than May 19, 2016. To allow for this deadline, any re-submittals are to be provided no later than seven (7) days before May 19, 2016.
4. Deliver the Aeration Basins Diffusers\_Equipment consistent with the RFP documents according to a schedule mutually agreed upon with the District and /or the District's Contractor.
5. Assist the Contractor to startup, test, train and put into operation the system to meet all specified requirements.
6. Provide preliminary operation and maintenance (O&M) manuals with storage and installation requirements in accordance with Specification Section 11439, Part 3.
7. Provide executed Patent License Agreement.
8. Meet other commercial warranty and risk management requirements set forth in this MOA and the RFP terms and documents.

## **II. District Obligations**

The District is undertaking the Aeration Basins Diffusers Instrumentation and Controls Project and will competitively bid and award a public works contract to upgrade its WRF Aeration Basins Diffusers System at its Wastewater Treatment Plant at 1515 Soscol Ferry Road, Napa, CA 94558. District agrees that subject to the conditions below, it shall award the public works construction contract to the lowest responsible and responsive bidder consistent with California law (the “Contractor”). As a result of this RFP process, District shall complete this design of the Project so as to accommodate Xylem’s aeration basins diffusers equipment and shall require District’s selected Contractor to install Xylem’s aeration basin diffusers equipment. District shall enter into a purchase order with Xylem to acquire aeration basins diffusers equipment solely from Xylem.

This obligation to obtain aeration basins diffusers equipment from Xylem shall be conditioned upon the award of the construction contract for the Project, and the favorable result of any legal challenge to this process which could result in a court order or judgment preventing the District from either executing the construction contract for the Project or requiring District’s Contractor to install Xylem’s aeration basins diffusers equipment. If District fails to proceed with the Project, is prevented from entering into the construction contract, or is prevented by legal proceedings from designating SXylem’s aeration basins diffusers equipment for inclusion in District’s Project, District shall not be liable to Xylem for any damages including, but not limited to restocking, proposal preparation and contracting costs, or loss of prospective profit.

## **III. Scope of Services & Deviations from Specifications**

The scope of supply and services shall be in accordance with the specifications, the RFP, and *Xylem’s* proposal with the following modifications. The following exceptions to the specifications were requested by Xylem and District’s determination regarding these requested exceptions is set forth below. Xylem agrees to supply the aeration basins diffusers equipment as set forth in the specifications with no Deviations.

**IV. Price**

- 1. The aeration basins diffusers equipment shall be manufactured, assembled, insured, crafted, delivered, and maintained prior to acceptance for the sum of one hundred and twenty one thousand, eight hundred and seven dollars in US currency \$121,807, exclusive of California sales tax. This total amount shall be inclusive of all payments for the vendor's costs including those costs set forth below.

Base Cost (including submittals)	\$121,807
Added Cost Items	\$ 0
<b>Total Equipment Supply Cost</b>	\$121,807 To be paid for by the District

- a. The price set forth herein shall reflect shipping F.O.B. to the District. District will not accept C.O.D. shipments. Xylem shall be responsible for payment of all charges for handling, shipping, packaging, wrapping, bags, container, boxing, crating, labeling, customs and duties, taxes (except for California sales tax), storage, insurance and other related matters. Selected Aeration Basins Diffusers Xylem shall cause all aeration basins diffusers equipment to be insured for the full value during all phases of packaging and delivery and such insurance shall remain in place until such time as Contractor has accepted delivery of products.

**V. Payment Terms**

Xylem agrees to provide the scope of services and supply at the proposed price on the following payment terms:

- 1. Total Equipment Supply Cost
  - a. 90% of the sum of the Total Equipment Cost as listed in Article IV Price, on delivery of the Aeration Basins Diffusers Equipment to site and acceptance by District's Contractor.
  - b. 10% of the sum of the Total Equipment Cost as listed in Article IV Price, on successful completion of performance testing, submittal and approval of the final O&M manual, training of District's employees and upon substantial completion of the Aeration Basins Diffusers, Instrumentation and Controls Project.

The partial payments set forth above shall be due only upon full and complete performance of each benchmark task listed above for all equipment and services required pursuant to the specifications.

A 10% retention will be withheld by District from each of the payments listed above. Such 10% retention shall be provided to the Selected Aeration Diffusers Equipment Vendor following substantial completion of the Project.

## **VI. Terms and Conditions**

1. **Factory Inspections:** Xylem acknowledges that time is of the essence for the manufacture, assembly and delivery of the Aeration Basins Diffusers Equipment System. Accordingly, Xylem shall authorize and arrange for manufacturing and assembly site inspection(s) by representatives of the District if necessary. The factory inspection requirements are set forth in the specifications.

District and/or Contractor will visually inspect shipment(s) from Xylem upon receipt at construction site to determine whether they conform to the requirements of this MOA. Notwithstanding these provisions for inspection, Xylem acknowledges that the aeration basins diffusers equipment is not reasonably subject to mere visual inspections to ascertain whether the equipment fully conforms to the specifications and that testing after installation is required prior to final acceptance of the equipment. Contractor shall be required to schedule performance testing to provide for presence of Xylem.

2. **Operations Manual and Training:** Xylem shall be responsible to provide an operations manual and training to the District's employees as is set forth in the specification. All costs associated with provision of the operations and maintenance manual and employee training shall be included in the price set forth above.
3. **Patent License Agreement:** The price set forth above shall include the cost for the Patent License Agreement attached hereto as Exhibit A. Xylem shall execute said Patent License Agreement and take such other actions as may be required to effectuate the licensing terms contained therein. The Patent License Agreement shall be executed and delivered to the District within 10 days of receipt of the payment due from District for delivery and acceptance of the equipment to the construction site.
4. **Price Escalation:** The costs included in this MOA shall remain in effect and are not subject to escalation unless the project is delayed and the District does not accept delivery of equipment prior to September 12, 2016. After such date, pricing is subject to an escalation clause based on a comparison to changes in the Producer Price Index ("PPI") Series Title: PPI- All Commodities: 1982-100 NSA (available at [www.bls.gov](http://www.bls.gov)) and supported by other documentation as required. The District will evaluate this information to determine if an adjustment to the pricing is fair and reasonable, and to the satisfaction of the District.
5. **Storage of The Aeration Basins Diffusers Equipment Prior to the Time for Delivery:** Xylem shall store said equipment at its cost in a safe manner and not subject to environmental degradation until District's Contractor is ready for delivery to site.
6. **Warranty:** Xylem expressly warrants that all goods and services shall conform to all specifications, drawings and samples. Goods and services shall be new and of good merchantable quality, free from material defects of workmanship and fit for the purpose for which sold or provided. For purposes of this warranty, any parts not meeting the

foregoing quality shall be deemed defective. Xylem provides warranties on all equipment provided as set forth in the specifications. The foregoing warranty provisions shall also be applicable to equipment or software supplied to Xylem by a third party entity and provided to the District via this MOA. Any warranties provided by third party equipment or software supplier shall be assigned to the District after final acceptance. All equipment supplied under this MOA shall have a one (1) year warranty from the Substantial Completion Date as detailed in Specification Section 11439 – Warranty and Guarantee.

7. Liens, Claims And Encumbrances: Xylem warrants and represents that all the goods when delivered will be free and clear of all liens, claims, encumbrances and infringements of any patents, trademarks, copyrights or franchise rights.
8. Independent Contractor: Xylem, and its employees or persons under contract to Xylem in the performance of services on this MOA, including services provided on District property, shall perform work as independent contractors. Xylem shall provide insurance to cover its work and its employees as required by the Contractor. Further, neither party to this MOA is the agent or legal representative of the other party for any purpose, nor shall the actions of either party under this MOA create a partnership, joint venture or relationship of principal and agent between the parties. Xylem shall maintain the following forms of insurance coverage for all work done on District property, and similarly require its subcontractors doing work on District property to maintain similar insurance, including: (1) Public Liability and Property Damage Insurance, including contractual liability, both general and automobile, in the amount of at least \$1,000,000 per occurrence for general liability, and \$1,000,000 per occurrence combined single limit for bodily injury and property damage for automobile liability (2) Workers' Compensation Insurance as required by law and for not less than \$1,000,000. With the exception of Worker's Compensation Insurance, the District and the Contractor shall be added as additional insureds to such policies.
9. Indemnification: Xylem agrees to indemnify, protect, hold harmless and defend District and District's Contractor, and their officers, agents, employees and boards, from any and all claims or liabilities arising from this MOA and from any liability imposed for injury, as defined by California Government Code Section 810.8, whether arising before or after completion of the work hereunder, or in any manner, directly or indirectly caused, claimed occasioned or contributed to, by reason of any negligent act or omission of Xylem, or by reason of claimed infringements of any patents, trademarks, copyrights or franchise rights, in connection with or incident to or arising out of the performance of this contract.
10. Assignment: Assignment by Xylem of its responsibilities under this MOA, will not be binding upon District or Contractor unless such assignment has had prior written approval of District, which approval shall be solely within the discretion of District. Failure to obtain approval of any assignment, including an involuntary assignment to creditors, shall constitute a breach of this MOA which may lead to termination.

11. Jurisdiction: This MOA shall be administered and interpreted under the laws of the State of California, including but not limited to the Uniform Commercial Code, without regard to the conflict of laws provisions thereof. The United Nations Convention on the International Sale of Products will not apply. The jurisdiction for any litigation arising from this Purchase Order shall be in the state of California, and shall be venued in the County of Marin of the Northern District of the U.S. District Court.
12. Modifications: No modification to this MOA, nor any waiver of any rights, shall be effective unless agreed to in writing by both Parties.
13. Liquidated Damages: The District may include liquidated damage penalties in the Purchase Order agreement with Xylem. Such damages are only applicable if directly related to the Xylem's failure to deliver the equipment within the time period stipulated in this MOA, failure to support the startup of the equipment, or failure of the equipment during the startup where any such failures result in a delay to the critical path of the construction project schedule. The amount of such damages shall not exceed the daily liquidated damages amount or \$1,000 per day and shall not exceed ten (10) percent of the total equipment contract price as listed in Article IV-Price of this MOA.
14. Notices: All notices under this MOA shall be in writing and shall be considered delivered and effective on the earlier of actual receipt or (i) the day following transmission if sent by facsimile when followed by written confirmation by overnight carrier or certified United States; or (ii) one (1) day after dispatch if sent by private overnight carrier (e.g., DHL, Federal Express); or (iii) five (5) days after posting if sent by certified mail. Notice shall be sent to the following persons:

Manufacturer: Xylem Water Solutions USA, Inc.

Contact Name: Brandon Olson

Address: 9333 North 49<sup>th</sup> Street, Brown Deer, Wisconsin 53223

Phone: Fax: 414-365-2200 (P), 414-365-2210 (F)

E-mail: Brandon.Olson@Xyleminc.com

15. Severability: If any portion of this MOA is held invalid, the Parties agree that such invalidity shall not affect the validity of the remaining portions of this MOA, and the Parties shall seek in good faith to agree to substitute for the invalid provision a valid provision that most closely approximates its terms.
16. Entire Agreement: This MOA along with the incorporated RFP and RFP documents, supersedes all proposals, oral or written, all negotiations, conversations or discussions between the Parties and contains the entire understanding and agreement of the Parties relating to this subject matter. In the event of a conflict between the terms and conditions of this MOA and its attachments, this MOA shall control.

This Memorandum of Agreement is hereby entered into between the Napa Sanitation District and Xylem. By signing this Memorandum of Agreement, the undersigned

asserts that they have the authority to enter into this agreement.

**District**

Napa Sanitation District

**Supplier**

\_\_\_\_\_  
Date

\_\_\_\_\_  
Date

Authorized Representative

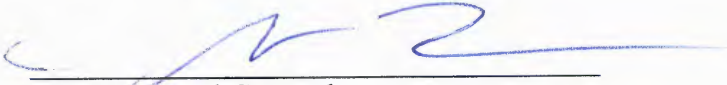
Napa Sanitation District

\_\_\_\_\_  
Xylem Water Solutions USA, Inc.

**Attest:**

\_\_\_\_\_  
District Clerk

**Approved as to Form:**

  
\_\_\_\_\_  
District Legal Counsel

**Referenced Attachments**

- Requests for Proposals (including all Addenda)
- Proposal from *Xylem*
- Notification Letter
- Patent License Agreement

-END OF SECTION-