

**CONSULTING SERVICES AGREEMENT BETWEEN
THE CITY OF MILPITAS AND HARRIS DESIGN**

THIS AGREEMENT for consulting services is made by and between the City of Milpitas ("City") and Harris Design ("Consultant") as of _____ in Milpitas, California.

AGREEMENT

Section 1. SERVICES. Subject to the terms and conditions set forth in this Agreement, Consultant shall provide to City the services described in the Scope of Work attached as Exhibit A at the time and place and in the manner specified therein. In the event of a conflict in or inconsistency between the terms of this Agreement and Exhibit A, the Agreement shall prevail.

- 1.1 **Term of Services.** The term of this Agreement shall begin on the date first noted above and shall end on September 30, 2008, the date of completion specified in Exhibit A, and Consultant shall complete all the work described in Exhibit A prior to that date, unless the term of the Agreement is otherwise terminated or extended, as provided for in Section 8. The time provided to Consultant to complete the services required by this Agreement shall not affect the City's right to terminate the Agreement, as provided for in Section 8.
- 1.2 **Standard of Performance.** Consultant shall perform all services required pursuant to this Agreement in the manner and according to the highest and best professional standards observed by a practitioner of the profession in which Consultant is engaged in the geographical area in which Consultant practices its profession. Consultant shall prepare all work products required by this Agreement in a substantial, first-class manner and shall conform to the highest and best professional standards of quality observed by a person practicing in Consultant's profession.
- 1.3 **Professional Skill.** It is mutually agreed by the parties that City is relying upon the professional skill of the consultant as a specialist in the work, and Consultant represents to the City that its work shall conform to the highest and best professional standards of the profession. Acceptance of the Consultant's work by the City does not operate as a release of Consultant's representations. It is intended that Consultant's work shall conform to the highest and best standards of accuracy, completeness and coordination.
- 1.4 **Assignment of Personnel.** Consultant shall assign only competent personnel to perform services pursuant to this Agreement. Exhibit A shall name any specific personnel (including title and hourly charge rate) who shall be performing services. In the event that City, in its sole discretion, at any time during the term of this Agreement, desires the reassignment of any such persons, Consultant shall,

immediately upon receiving notice from City of such desire of City, reassign such person or persons.

- 1.5 **Time.** Consultant shall devote such time to the performance of services pursuant to this Agreement as may be reasonably necessary to meet the standard of performance provided in Section 1 above and to complete Consultant's obligations hereunder.

Section 2. COMPENSATION. City hereby agrees to pay Consultant an amount not to exceed \$ 159,750.00 for all services to be performed and reimbursable costs incurred under this Agreement. City shall pay Consultant for services rendered pursuant to this Agreement at the time and in the manner set forth herein. The payments specified below shall be the only payments from City to Consultant for services rendered pursuant to this Agreement. Consultant shall submit all invoices to City in the manner specified herein. Except as specifically authorized by City, Consultant shall not bill City for duplicate services performed by more than one person.

Consultant and City acknowledge and agree that compensation paid by City to Consultant under this Agreement is based upon Consultant's estimated costs of providing the services required hereunder, including salaries and benefits of employees and subcontractors of Consultant. Consultant further represents that the amount of the compensation specified in this Section 2 shall be a guaranteed maximum price. Hourly rates for personnel performing services shall be as shown in Exhibit B. Consequently, the parties further agree that compensation hereunder is intended to include the costs of contributions to any pensions and/or annuities to which Consultant and its employees, agents, and subcontractors may be eligible. City therefore has no responsibility for such contributions beyond compensation required under this Agreement.

- 2.1 **Invoices.** Consultant shall submit invoices, not more often than once a month during the term of this Agreement, based on the cost for services performed and reimbursable costs incurred during the billing period. Invoices shall contain the following information:
- Serial identification of bills; ("Invoice #")
 - The beginning and ending dates of the billing period;
 - A Task Summary containing the City project name and number, purchase order number, Project Manager, original contract amount, the amount of prior billings, the total due this period, the balance available under the Agreement, and the percentage of completion, if applicable;
 - Consultant shall use the City's "Consultant Progress Payment" format specified in Exhibit C for invoice tracking and shall submit the form with each invoice.
 - At City's option, for each work item in each task, a copy of the applicable time entries or time sheets shall be submitted showing the name of the person doing the work, the hours spent by each person, a brief description of the work, and each reimbursable expense;
 - The total number of hours of work performed under the Agreement by Consultant and each employee, agent, and subcontractor of Consultant

performing services hereunder, as well as a separate notice when the total number of hours of work by Consultant and any individual employee, agent, or subcontractor of Consultant reaches or exceeds 800 hours, which shall include an estimate of the time necessary to complete the work described in Exhibit A:

- The Consultant's signature.

2.2 **Monthly Payment.** City shall make monthly payments, based on invoices received, for services satisfactorily performed, and for authorized reimbursable costs incurred. City shall have thirty (30) days from the receipt of an invoice that complies with all of the requirements above and is otherwise acceptable to the City to pay Consultant. Ten (10) percent shall be retained by the City from each contract billing until the completion of the contract unless authorized differently by City. In the event that an invoice is not acceptable to the City, said invoice shall be returned to Consultant within thirty (30) days of the City's receipt of the invoice with a detailed explanation of the deficiency. City's obligation to pay a returned invoice shall not arise earlier than thirty (30) days after resubmission of the corrected invoice.

2.3 **Total Payment.** City shall pay for the services to be rendered by Consultant pursuant to this Agreement. City shall not pay any additional sum for any expense or cost whatsoever incurred by Consultant in rendering services pursuant to this Agreement. City shall make no payment for any extra, further, or additional service pursuant to this Agreement.

In no event shall Consultant submit any invoice for an amount in excess of the maximum amount of compensation provided above either for a task or for the entire Agreement, unless the Agreement is modified prior to the submission of such an invoice by a properly executed change order or amendment. In the event that Consultant identifies additional work outside the scope of services specified in Exhibit A that may be required to complete the work required under this Agreement, Consultant shall immediately notify the City and shall provide a written not-to-exceed price for performing this additional work. Consultant shall not perform extra work without specific written City approval.

2.4 **Hourly Fees.** Fees for work performed by Consultant on an hourly basis shall not exceed the amounts shown on Exhibit B.

2.5 **Reimbursable Expenses.** Reimbursable expenses are shown on Exhibit B, and shall not exceed five thousand dollars (\$5,000.00). Expenses not listed in Exhibit B are not chargeable to City. Reimbursable expenses are included in the total not-to-exceed amount of compensation provided under this Agreement.

2.6 **Payment of Taxes.** Consultant is solely responsible for the payment of employment taxes incurred under this Agreement and any other applicable federal or state taxes.

2.7 **Payment upon Termination.** In the event that the City or Consultant terminates this Agreement pursuant to Section 8, the City shall compensate the Consultant for all outstanding costs and reimbursable expenses incurred for work satisfactorily completed as of the date of written notice of termination. Consultant shall maintain adequate logs and timesheets in order to verify costs incurred to that date. The City shall have no obligation to compensate Consultant for work not verified by logs or timesheets.

2.8 **Authorization to Perform Services.** The Consultant is not authorized to perform any services or incur any costs whatsoever under the terms of this Agreement until receipt of a written Notice to Proceed from the City.

Section 3. FACILITIES AND EQUIPMENT. Except as set forth herein, Consultant shall, at its sole cost and expense, provide all facilities and equipment that may be necessary to perform the services required by this Agreement. City shall make available to Consultant only the facilities and equipment listed in this section, and only under the terms and conditions set forth herein.

City shall furnish physical facilities such as desks, filing cabinets, and conference space, as may be reasonably necessary for Consultant's use while consulting with City employees and reviewing records and the information in possession of the City. The location, quantity, and time of furnishing those facilities shall be in the sole discretion of City. In no event shall City be obligated to furnish any facility that may involve incurring any direct expense, including but not limited to computer, cellular telephone, long-distance telephone, or other communication charges, vehicles, and reproduction facilities.

If the performance of the work specified in Exhibit A requires destructive testing or other work within the City's public right-of-way, Consultant, or Consultant's subconsultant, shall obtain an encroachment permit from the City.

Section 4. INSURANCE REQUIREMENTS. Before beginning any work under this Agreement, Consultant shall procure "occurrence coverage" insurance against claims for injuries to persons or damages to property that may arise from or in connection with the performance of the work hereunder by the Consultant and its agents, representatives, employees, and subcontractors. Consultant shall provide proof satisfactory to City of such insurance that meets the requirements of this section and under forms of insurance satisfactory in all respects to the City. Consultant shall maintain the insurance policies required by this section throughout the term of this Agreement and shall produce said policies to the City upon demand. The cost of such insurance shall be included in the Consultant's price. Consultant shall not allow any subcontractor to commence work on any subcontract until Consultant has obtained all insurance required herein for the subcontractor(s) and provided evidence thereof to City. Verification of the required insurance shall be submitted and made part of this Agreement prior to execution.

4.1 **Workers' Compensation.** Consultant shall, at its sole cost and expense, maintain Statutory Workers' Compensation Insurance and Employer's Liability Insurance for any and all persons employed directly or indirectly by Consultant.

The Statutory Workers' Compensation Insurance and Employer's Liability Insurance shall be provided with limits of not less than ONE MILLION DOLLARS (\$1,000,000.00) per accident. In the alternative, Consultant may rely on a self-insurance program to meet those requirements, but only if the program of self-insurance complies fully with the provisions of the California Labor Code. Determination of whether a self-insurance program meets the standards of the Labor Code shall be solely in the discretion of the City Attorney. The insurer, if insurance is provided, or the Consultant, if a program of self-insurance is provided, shall waive all rights of subrogation against the City and its officers, officials, employees, and volunteers for loss arising from work performed under this Agreement.

4.2 Commercial General and Automobile Liability Insurance.

- 4.2.1 General requirements. Consultant, at its own cost and expense, shall maintain commercial general and automobile liability insurance for the term of this Agreement in an amount not less than ONE MILLION DOLLARS (\$1,000,000.00) per occurrence, combined single limit coverage for risks associated with the work contemplated by this Agreement. If a Commercial General Liability Insurance or an Automobile Liability form or other form with a general aggregate limit is used, either the general aggregate limit shall apply separately to the work to be performed under this Agreement or the general aggregate limit shall be at least twice the required occurrence limit. Such coverage shall include but shall not be limited to, protection against claims arising from bodily and personal injury, including death resulting therefrom, and damage to property resulting from activities contemplated under this Agreement, including the use of owned and non-owned automobiles.
- 4.2.2 Minimum scope of coverage. Commercial general coverage shall be at least as broad as Insurance Services Office Commercial General Liability occurrence form CG 0001 (ed. 11/88) or Insurance Services Office form number GL 0002 (ed. 1/73) covering comprehensive General Liability and Insurance Services Office form number GL 0404 covering Broad Form Comprehensive General Liability. Automobile coverage shall be at least as broad as Insurance Services Office Automobile Liability form CA 0001 (ed. 12/90) Code 1 ("any auto"). No endorsement shall be attached limiting the coverage.
- 4.2.3 Additional requirements. Each of the following shall be included in the insurance coverage or added as an endorsement at least as broad as Insurance Services Office form number CG 20 10 (11/85 ed.) to the policy:
- a. City and its officers, employees, agents, contractors, consultants, and volunteers shall be covered as insureds with respect to each of the following: liability arising out of activities performed by or on

behalf of Consultant, including the insured's general supervision of Consultant; products and completed operations of Consultant; premises owned, occupied, or used by Consultant; and automobiles owned, leased, or used by the Consultant. The coverage shall contain no special limitations on the scope of protection afforded to City or its officers, employees, agents, contractors, consultants, or volunteers.

- b. The insurance shall cover on an occurrence or an accident basis, and not on a claims-made basis.
- c. An endorsement must state that coverage is primary insurance with respect to the City and its officers, officials, employees, contractors, consultants, and volunteers, and that no insurance or self-insurance maintained by the City shall be called upon to contribute to a loss under the coverage.
- d. Any failure of CONSULTANT to comply with reporting provisions of the policy shall not affect coverage provided to CITY and its officers, employees, agents, and volunteers.
- e. An endorsement shall state that coverage shall not be suspended, voided, or canceled by either party, reduced in coverage or in limits, except after thirty (30) days' prior written notice by certified mail, return receipt requested, has been given to the City.

4.3 Professional Liability Insurance. If Consultant shall be performing licensed professional services, Consultant shall maintain for the period covered by this Agreement professional liability insurance for licensed professionals performing work pursuant to this Agreement in an amount not less than ONE MILLION DOLLARS (\$1,000,000) covering the licensed professionals' errors and omissions.

- 4.3.1 Any deductible or self-insured retention shall not exceed \$150,000 per claim.
- 4.3.2 An endorsement shall state that coverage shall not be suspended, voided, canceled by either party, reduced in coverage or in limits, except after thirty (30) days' prior written notice by certified mail, return receipt requested, has been given to the City.
- 4.3.3 The policy must contain a cross liability clause.
- 4.3.4 The following provisions shall apply if the professional liability coverages are written on a claims-made form:

- a. The retroactive date of the policy must be shown and must be before the date of the Agreement.
- b. Insurance must be maintained and evidence of insurance must be provided for at least three years after completion of the Agreement or the work, unless waived in writing by the City.
- c. If coverage is canceled or not renewed and it is not replaced with another claims-made policy form with a retroactive date that precedes the date of this Agreement, Consultant must provide extended reporting coverage for a minimum of five years after completion of the Agreement or the work. The City shall have the right to exercise, at the Consultant's sole cost and expense, any extended reporting provisions of the policy, if the Consultant cancels or does not renew the coverage.
- d. A copy of the claim reporting requirements must be submitted to the City prior to the commencement of any work under this Agreement.

4.4 Requirements for All Policies.

- 4.4.1 Acceptability of insurers. All insurance required by this section is to be placed with insurers with a Bests' rating of no less than A.
- 4.4.2 Verification of coverage. Prior to beginning any work under this Agreement, Consultant shall furnish City with certificates of insurance and with original endorsements effecting coverage required herein. The certificates and endorsements for each insurance policy are to be signed by a person authorized by that insurer to bind coverage on its behalf. The City reserves the right to require complete, certified copies of all required insurance policies at any time.
- 4.4.3 Subcontractors. Consultant shall include all subcontractors as insureds under its policies or shall furnish separate certificates and endorsements for each subcontractor. All coverages for subcontractors shall be subject to all of the requirements stated herein.
- 4.4.4 Deductibles and Self-Insured Retentions. Consultant shall disclose to and obtain the approval of City for the self-insured retentions and deductibles before beginning any of the services or work called for by any term of this Agreement.

During the period covered by this Agreement, only upon the prior express written authorization of the City, Consultant may increase such deductibles or self-insured retentions with respect to City, its officers,

employees, agents, contractors, consultants, and volunteers. The City may condition approval of an increase in deductible or self-insured retention levels with a requirement that Consultant procure a bond, guaranteeing payment of losses and related investigations, claim administration, and defense expenses that is satisfactory in all respects to the City.

4.4.5 Notice of Reduction in Coverage. In the event that any coverage required by this section is reduced, limited, or materially affected in any other manner, Consultant shall provide written notice to City at Consultant's earliest possible opportunity and in no case later than five days after Consultant is notified of the change in coverage.

4.5 Remedies. In addition to any other remedies City may have if Consultant fails to provide or maintain any insurance policies or policy endorsements to the extent and within the time herein required, City may, at its sole option exercise any of the following remedies, which are alternatives to other remedies City may have and are not the exclusive remedy for Consultant's breach:

- Obtain such insurance and deduct and retain the amount of the premiums for such insurance from any sums due under the Agreement;
- Order Consultant to stop work under this Agreement or withhold any payment that becomes due to Consultant hereunder, or both stop work and withhold any payment, until Consultant demonstrates compliance with the requirements hereof; and/or
- Declare Consultant in material breach of the Agreement and terminate the Agreement.

4.6 Waiver. The Risk Manager of the City has the authority to waive or vary any provision of Sections 4.2 through 4.5. Any such waiver or variation shall not be effective unless made in writing.

Section 5. INDEMNIFICATION AND CONSULTANT'S RESPONSIBILITIES. Consultant shall indemnify, defend with counsel reasonably acceptable to the City, and hold harmless the City and its officials, officers, employees, agents, contractors, consultants, and volunteers from and against any and all losses, liability, claims, suits, actions, damages, and causes of action arising out of any personal injury, bodily injury, loss of life, or damage to property, or any violation of any federal, state, or municipal law or ordinance, to the extent caused, in whole or in part, by the willful misconduct or negligent acts or omissions of Consultant or its employees, subcontractors, or agents, by acts for which they could be held strictly liable, or by the quality or character of their work. The foregoing obligation of Consultant shall not apply when (1) the injury, loss of life, damage to property, or violation of law arises wholly from the negligence or willful misconduct of the City or its officers, employees, agents, contractors, consultants, or volunteers and (2) the actions of Consultant or its employees, subcontractor, or agents have contributed in no part to the

injury, loss of life, damage to property, or violation of law. It is understood that the duty of Consultant to indemnify and hold harmless includes the duty to defend as set forth in Section 2778 of the California Civil Code. Acceptance by City of insurance certificates and endorsements required under this Agreement does not relieve Consultant from liability under this indemnification and hold harmless clause. This indemnification and hold harmless clause shall apply to any damages or claims for damages whether or not such insurance policies shall have been determined to apply. By execution of this Agreement, Consultant acknowledges and agrees to the provisions of this Section and that it is a material element of consideration.

In the event that Consultant or any employee, agent, or subcontractor of Consultant providing services under this Agreement is determined by a court of competent jurisdiction or the California Public Employees Retirement System (PERS) to be eligible for enrollment in PERS as an employee of City, Consultant shall indemnify, defend, and hold harmless City for the payment of any employee and/or employer contributions for PERS benefits on behalf of Consultant or its employees, agents, or subcontractors, as well as for the payment of any penalties and interest on such contributions, which would otherwise be the responsibility of City.

Section 6. STATUS OF CONSULTANT.

- 6.1 **Independent Contractor.** At all times during the term of this Agreement, Consultant shall be an independent contractor and shall not be an employee of City. City shall have the right to control Consultant only insofar as the results of Consultant's services rendered pursuant to this Agreement and assignment of personnel pursuant to Subparagraph 1.3. Otherwise, City shall not have the right to control the means by which Consultant accomplishes services rendered pursuant to this Agreement. Notwithstanding any other City, state, or federal policy, rule, regulation, law, or ordinance to the contrary, Consultant and any of its employees, agents, and subcontractors providing services under this Agreement shall not qualify for or become entitled to, and hereby agree to waive any and all claims to, any compensation, benefit, or any incident of employment by City, including but not limited to eligibility to enroll in the California Public Employees Retirement System (PERS) as an employee of City and entitlement to any contribution to be paid by City for employer contributions and/or employee contributions for PERS benefits.
- 6.2 **Consultant No Agent.** Except as City may specify in writing, Consultant shall have no authority, express or implied, to act on behalf of City in any capacity whatsoever as an agent. Consultant shall have no authority, express or implied, pursuant to this Agreement to bind City to any obligation whatsoever.

Section 7. LEGAL REQUIREMENTS.

- 7.1 **Governing Law.** The laws of the State of California shall govern this Agreement.
- 7.2 **Compliance with Applicable Laws.** Consultant and any subcontractors shall comply with all laws applicable to the performance of the work hereunder.

- 7.3 **Other Governmental Regulations.** To the extent that this Agreement may be funded by fiscal assistance from another governmental entity, Consultant and any subcontractors shall comply with all applicable rules and regulations to which City is bound by the terms of such fiscal assistance program.
- 7.4 **Licenses and Permits.** Consultant represents and warrants to City that Consultant and its employees, agents, and any subcontractors have all licenses, permits, qualifications, and approvals of whatsoever nature that are legally required to practice their respective professions. Consultant represents and warrants to City that Consultant and its employees, agents, any subcontractors shall, at their sole cost and expense, keep in effect at all times during the term of this Agreement any licenses, permits, and approvals that are legally required to practice their respective professions and to perform this Agreement. In addition to the foregoing, Consultant and any subcontractors shall obtain and maintain during the term of this Agreement valid business license from City.
- 7.5 **Nondiscrimination and Equal Opportunity.** Consultant shall not discriminate, on the basis of a person's race, religion, color, national origin, age, physical or mental handicap or disability, medical condition, marital status, sex, or sexual orientation, against any employee, applicant for employment, subcontractor, bidder for a subcontract, or participant in, recipient of, or applicant for any services or programs provided by Consultant under this Agreement. Consultant shall comply with all applicable federal, state, and local laws, policies, rules, and requirements related to equal opportunity and nondiscrimination in employment, contracting, and the provision of any services that are the subject of this Agreement, including but not limited to the satisfaction of any positive obligations required of Consultant thereby.

Consultant shall include the provisions of this Subsection in any subcontract approved by the City or this Agreement.

Section 8. TERMINATION AND MODIFICATION.

- 8.1 **Termination.** City may terminate this Agreement at any time and without cause upon written notification to Consultant.

In the event of termination, Consultant shall be entitled to compensation for services performed prior to the effective date of termination as provided in Section 2. City, however, may condition payment of such compensation upon Consultant delivering to City any or all documents, photographs, computer software, video and audio tapes, and other materials provided to Consultant or prepared by or for Consultant or the City in connection with this Agreement.

- 8.2 **Extension.** City may, in its sole and exclusive discretion, extend the end date of this Agreement beyond that provided for in Subsection 1.1. Any such extension

shall be specified in writing by the City. Consultant understands and agrees that, if City issues such an extension, City shall have no obligation to provide Consultant with compensation beyond the maximum amount provided for in this Agreement. Similarly, unless authorized by the City, City shall have no obligation to reimburse Consultant for any otherwise reimbursable expenses incurred during the extension period.

- 8.3 **Amendments.** The parties may amend this Agreement only by a writing signed by all the parties.
- 8.4 **Assignment and Subcontracting.** City and Consultant recognize and agree that this Agreement contemplates personal performance by Consultant and is based upon a determination of Consultant's unique personal competence, experience, and specialized personal knowledge. Moreover, a substantial inducement to City for entering into this Agreement was and is the professional reputation and competence of Consultant. Consultant may not assign this Agreement or any interest therein without the prior written approval of the City. Consultant shall not subcontract any portion of the performance contemplated and provided for herein, other than to the subcontractors listed in the Consultant's proposal, without prior written approval of the City.
- 8.5 **Survival.** All obligations arising prior to the termination of this Agreement and all provisions of this Agreement allocating liability between City and Consultant shall survive the termination of this Agreement.
- 8.6 **Options upon Breach by Consultant.** If Consultant materially breaches any of the terms of this Agreement, City's remedies shall include, but not be limited to, any or all of the following:
- 8.6.1 Immediate cancellation of the Agreement;
 - 8.6.2 Retention of the plans, specifications, drawings, reports, design documents, and any other work product prepared by Consultant pursuant to this Agreement prior to cancellation; and
 - 8.6.3 Retention of a different consultant at Consultant's cost to complete the work described in Exhibit A not finished by Consultant.

Section 9. KEEPING AND STATUS OF RECORDS.

- 9.1 **Records Created as Part of Consultant's Performance.** All reports, data, maps, models, charts, studies, surveys, calculations, photographs, memoranda, plans, studies, specifications, records, files, or any other documents or materials, in electronic or any other form, that Consultant prepares or obtains pursuant to this Agreement and that relate to the matters covered hereunder shall be the property of the City. Consultant hereby agrees to deliver those documents to the City at

any time upon demand of the City. It is understood and agreed that the documents and other materials, including but not limited to those described above, prepared pursuant to this Agreement are prepared specifically for the City and are not necessarily suitable for any future or other use. Failure by Consultant to deliver these documents to the City within the time period specified by the City shall be a material breach of this Agreement. City and Consultant agree that, until final approval by City, all data, plans, specifications, reports and other documents are preliminary drafts not kept by the City in the ordinary course of business and will not be disclosed to third parties without prior written consent of both parties. All work product submitted to the City pursuant to this Agreement shall be deemed a "work for hire". Upon submission of any work for hire pursuant to this Agreement, and acceptance by the City as complete, non-exclusive title to copyright of said work for hire shall transfer to the City. The compensation recited in Exhibit B shall be deemed to be sufficient consideration for said transfer of copyright.

- 9.2 **Consultant's Books and Records.** Consultant shall maintain any and all ledgers, books of account, invoices, vouchers, canceled checks, and other records or documents evidencing or relating to charges for services or expenditures and disbursements charged to the City under this Agreement for a minimum of three (3) years, or for any longer period required by law, from the date of final payment to the Consultant to this Agreement.
- 9.3 **Inspection and Audit of Records.** Any records or documents that Section 9.2 of this Agreement requires Consultant to maintain shall be made available for inspection, audit, and/or copying at any time during regular business hours, upon oral or written request of the City. Under California Government Code Section 8546.7, if the amount of public funds expended under this Agreement exceeds TEN THOUSAND DOLLARS (\$10,000.00), the Agreement shall be subject to the examination and audit of the State Auditor, at the request of City or as part of any audit of the City, for a period of three (3) years after final payment under the Agreement.

Section 10 MISCELLANEOUS PROVISIONS.

- 10.1 **Attorneys' Fees.** If a party to this Agreement brings any action, including an action for declaratory relief, to enforce or interpret the provision of this Agreement, the prevailing party shall be entitled to reasonable attorneys' fees in addition to any other relief to which that party may be entitled. The court may set such fees in the same action or in a separate action brought for that purpose.
- 10.2 **Venue.** In the event that either party brings any action against the other under this Agreement, the parties agree that trial of such action shall be vested exclusively in the state courts of California in the County of Santa Clara or in the United States District Court for the Northern District of California.

- 10.3 **Severability.** If a court of competent jurisdiction finds or rules that any provision of this Agreement is invalid, void, or unenforceable, the provisions of this Agreement not so adjudged shall remain in full force and effect. The invalidity in whole or in part of any provision of this Agreement shall not void or affect the validity of any other provision of this Agreement.
- 10.4 **No Implied Waiver of Breach.** The waiver of performance or any breach of a specific provision of this Agreement does not constitute a waiver of any other breach of that term or any other term of this Agreement.
- 10.5 **Successors and Assigns.** The provisions of this Agreement shall inure to the benefit of and shall apply to and bind the successors and assigns of the parties.
- 10.6 **Use of Recycled Products.** Consultant shall prepare and submit all reports, written studies and other printed material on recycled paper to the extent it is available at equal or less cost than virgin paper.
- 10.7 **Conflict of Interest.** Consultant may serve other clients, but none whose activities within the corporate limits of City or whose business, regardless of location, would place Consultant in a "conflict of interest," as that term is defined in the Political Reform Act, codified at California Government Code Section 81000 *et seq.*

Consultant shall not employ any City official in the work performed pursuant to this Agreement. No officer or employee of City shall have any financial interest in this Agreement that would violate California Government Code Sections 1090 *et seq.*

Consultant hereby warrants that it is not now, nor has it been in the previous twelve (12) months, an employee, agent, appointee, or official of the City. If Consultant were an employee, agent, appointee, or official of the City in the previous twelve months, Consultant warrants that it did not participate in any manner in the forming of this Agreement. Consultant understands that, if this Agreement is made in violation of Government Code §1090 *et seq.*, the entire Agreement is void and Consultant will not be entitled to any compensation for services performed pursuant to this Agreement, including reimbursement of expenses, and Consultant will be required to reimburse the City for any sums paid to the Consultant. Consultant understands that, in addition to the foregoing, it may be subject to criminal prosecution for a violation of Government Code § 1090 and, if applicable, may be disqualified from holding public office in the State of California.

Consultant certifies that it has not paid any direct or contingent fee, contribution, donation or consideration of any kind to any firm, organization, or person (other than a bona fide employee of Consultant) in connection with procuring this Agreement, nor has Consultant agreed to employ or retain any firm, organization,

or person in connection with the performance of this Agreement as a condition for obtaining this Agreement.

- 10.8 **Solicitation.** Consultant agrees not to solicit business at any meeting, focus group, or interview related to this Agreement, either orally or through any written materials.
- 10.9 **Ownership of Documents.** All documents developed or obtained by Consultant in the performance of the Agreement shall be deemed to be the property of the City.
- 10.10 **Contract Administration.** This Agreement shall be administered by Greg Armendariz, who is authorized to act for, and on behalf of City. All correspondence shall be directed to or through the Contract Administrator or his or her designee.
- 10.11 **Notices.** Any written notice to Consultant shall be sent to:
- Mr. Bill Harris
Harris Design
6515 Ascot Drive
Oakland, CA 94611
- Any written notice to City shall be sent to:
Greg Armendariz, City Engineer/Public Works Director
455 East Calaveras Boulevard
Milpitas, California 95035
- 10.12 **Integration.** This Agreement, including the exhibits, represents the entire and integrated agreement between City and Consultant and supersedes all prior negotiations, representations, or agreements, either written or oral.
- 10.13 **Exhibits.** All exhibits referenced in this Agreement are incorporated by reference herein.

CITY OF MILPITAS

CONSULTANT

Thomas C. Williams, City Manager

Bill Harris

ATTEST:

Mary Lavelle, City Clerk

Taxpayer Identification Number

APPROVED AS TO FORM:

Steven T. Mattas, City Attorney

APPROVED AS TO CONTENT:

Greg Armendariz, City Engineer/PW Director

APPROVED:

Emma Karlen, Finance Director/Risk Manager

Attachments:

- Exhibit A: Scope of Services
- Exhibit B: Compensation Schedule, personnel and rates
- Exhibit C: Insurance Coverage Documents
- Exhibit D: Sample Progress Payment form

EXHIBIT A
Milpitas Parks and Recreation Master Plan
Scope of Services
Harris Design

BASIC SERVICES

1.0 Inventory and Analysis

Purpose: The Inventory and Analysis Phase provides an accurate baseline of existing conditions and policies, providing an objective foundation for future planning decisions.

1.01 City Staff Kick-Off Meeting #1

The consultant will meet with City Staff to discuss the scope and schedule of the project. The consultant will facilitate the meeting as a work session to arrive at an initial definition of City goals, issues, and concerns. The consultant will be responsible for taking written meeting minutes and transmitting them to participants for this and all other meetings.

1.02 Base Data Collection and Review

Available background data will be collected and reviewed, including the City General Plan, 1992 Park Needs Assessment, Zoning, Subdivision Maps, and Capital Improvement Program. Available base maps, park plans, surveys, or aerial photographs will be collected from City Staff for use in project mapping and planning.

1.03 Interview City Staff

City professional staff from appropriate departments will be interviewed by the consultant to gather information regarding existing conditions, policies, plans, and issues applicable to the Parks master planning process.

1.04 Inventory of Existing Facilities

Existing City- and School-District owned sites will be inventoried. The consultant will tour each site and prepare a detailed inventory of physical conditions, features, opportunities, and constraints, along with a photo log for each facility. Maintenance needs will be identified. A detailed inventory of each park and facility will be conducted, to include the following components at a minimum:

- Parking
- Hardscape and paving
- Restrooms
- Sports facilities
- Planting
- Irrigation
- Drainage
- Lighting condition and lighting levels
- Playgrounds

- Site furnishings

1.05 Analysis of City-wide Facilities

A quantitative summary of City-wide facilities will be prepared in text, tables, and graphic form. Factors to be summarized will include park acreage (expressed as park acreage per 1000 population), numbers of sports facilities (expressed as population served by each facility), miles of trails, etc.

1.06 Define Planning Areas

“Neighborhood planning areas” will be defined and mapped using existing planning information, future development plans, and an analysis of physical features. For the Parks Master Plan, the planning areas will correspond to logical neighborhoods defined by physical barriers to pedestrian movement containing populations of up to 3,000 to 4,000.

1.07 Quantify Existing Deficiencies and/or Oversupply

The current supply of parkland, trails, and sports facilities will be compared with current City acreage standards and City goals to determine any existing deficiencies and/or oversupply. These will be quantified and incorporated into the financial planning component of the Master Plan.

1.08 Opportunities and Constraints Analysis

The Master Plan will comprehensively analyze the City-wide opportunities and constraints presented by the City’s physical features as overlaid by the cultural structure of roads, development, and land ownership. Potential sites for new parks will be identified if possible. In addition, the planning matrix of future subdivision and infill development will be analyzed for impact on the parks system and opportunities for incorporation of necessary and creative recreational features.

1.09 ADA Analysis

All existing parks will be inventoried and evaluated for their conformance with ADA (Americans with Disabilities Act). The ADA analysis will evaluate:

- Accessible parking
- Accessible routes of travel to the various park use areas
- Accessibility of individual park facilities, such as picnic tables, sports facilities, restrooms, etc.

This task excludes an ADA Transition Plan, and an architectural analysis of recreation buildings and restroom interiors. It also excludes ADA and CPSC analysis of the park playground areas. Please refer to Phase 7.0 for the park playground services.

2.0 Needs Assessment

Purpose: The Needs Assessment Phase provides a defensible basis for the Master Plan proposals by defining the range of recreational facilities needed to serve current and future populations.

2.01 Demographic Trends Analysis

Using information as available from the U.S. Census, State Department of Finance, local Council of Governments, and other sources, a demographic analysis will be prepared that profiles existing and projected future City residents through the 2020 planning time horizon.

2.02 Recreation Trends Analysis

Using information as available in the City's Needs Assessment, U.S.C. 2020 Study, National Sporting Goods Association survey, State of California attitudes survey, and other sources, a discussion of recreation trends will be prepared. Specific Milpitas demographic trends will be examined and used to ensure that the trends analysis accurately reflects the local community, and recognizes the differences between Milpitas and other California communities.

2.03 City Staff Meeting #2

Meet with Staff to review inventory and needs assessment information. Review and confirm format and content of first public workshop.

2.04 Community Workshop #1

The inventory, analysis, and needs assessment information prepared during the first two project phases will be presented to the community in a public workshop. The workshop will be held at a Parks, Recreation, and Community Services Commission meeting. The consultant will be responsible for all meeting logistics, including public facilitation, recording input, and summarizing the results in a written workshop summary. The workshop will be an open public forum designed to promote quality interaction through large and small group discussions, prioritization exercises, and comment sheets. The comment sheets will be provided at the workshops for use by persons who are not comfortable with public speaking, to capture additional comments as they arise, and for additional outreach throughout the course of the project. The consultant will record the comments received and incorporate them into the needs assessment.

2.05 Draft Inventory and Needs Assessment Report

The results of phase 1.0 and 2.0 will be summarized in a report complete with text, tables, photographs, and graphics.

3.0 Action Plan

Purpose: The Action Plan Phase translates the inventory, analysis, and needs assessment information into a detailed capital improvement plan for implementation over the 15-year planning time horizon (or other time period as directed by City Staff).

3.01 Prepare Action Plan Diagram and Improvement Projects Descriptions

A City-wide diagram will be prepared that illustrates all existing and proposed parks and recreation facilities. An outline description of proposed improvements of existing parks and development of new parks will be prepared.

3.02 Specific Recommendations for Existing Parks

Recommendations for improvements of all existing parks, trails, and facilities will be prepared. Recommendations for value engineering and reduction of maintenance costs will be prepared. Elements will include but not be limited to:

- Parking
- Hardscape and paving
- Restrooms
- Sports facilities
- Planting
- Irrigation
- Drainage
- Lighting condition and lighting levels
- Playgrounds
- Site furnishings

3.03 Draft Facilities Standards

The standards adopted in the 1992 Needs Assessment will be reviewed and updated as appropriate based on the needs assessment findings.

3.04 Preliminary Cost Estimates

Rough order-of-magnitude cost estimates will be prepared for the listed improvements. These will be based on a per-acre, per-square foot, per-mile, and per-each basis.

3.05 City Staff Meeting #3

The consultant will meet with City staff to review the action plan and discuss direction for any revisions.

3.06 Revise as necessary

The action plan will be revised as necessary for presentation to the public.

4.0 Funding Plan

Purpose: The funding plan identifies potential funding sources for future capital improvements and operation and maintenance.

4.01 Update Cost Estimates for Capital Improvements

The estimated project costs will be updated to conform to the direction received by Commission and through the public involvement process.

4.02 Funding Plan

This task includes (1) identifying and evaluating a complete array of financing mechanisms available in California to finance municipal park and recreation improvements as well as on-going operations and maintenance costs; (2) preparing a financing matrix showing which techniques are appropriate to finance which classes of improvements. The techniques to be examined include (but are not limited to) Development Impact Fees, Quimby Act land dedication and in-lieu fee requirements, Community Facilities Districts, Landscaping and Lighting Assessment

Districts, Benefit Assessment Districts, Business Improvement Districts, General Obligation Bonds, Certificates of Participation, State and Federal Grants, Gifts and Bequests and user fees. The financing matrices will summarize where each mechanism might be appropriate and where it cannot be applied. For example, development impact fees can be used to acquire and develop parkland to support the requirements of new residential development but cannot be used to remedy an existing deficiency in parks.

5.0 Maintenance Plan

Purpose: The maintenance plan provides an implementation plan for future operation and maintenance of the park system. It provides a framework for forecasting maintenance needs and costs over the time horizon associated with the master plan.

5.01 Maintenance Plan

The maintenance plan will evaluate existing conditions and provide a recommended strategy for ongoing maintenance of the various components that make up the City's parks system. The maintenance plan will provide a site-specific evaluation and recommendations for each park, trail, and sports facility. Indoor facilities and aquatic center are not included in this study. Tasks will include:

- Consult with City Staff to obtain a baseline description of current maintenance practices and costs. Define specific maintenance issues of the existing parks, trails, and sports fields.
- Using the inventory of existing conditions completed in Phase 1.0, prepare a spreadsheet that lists each of the major physical components contained within the City's parks system.
- Define recommended maintenance tasks for each component.
- Recommend a schedule for maintenance tasks over a 15 year timeframe.
- Provide estimated costs for labor and materials for each maintenance task.
- Define the projected life cycle for each item. Recommend timeframes for rehabilitation and replacement for park system components.
- Prepare a similar spreadsheet with site-specific recommendations and maintenance scheduling for each individual park, trail, and sports field.

6.0 Final Master Plan and Approval Process

Purpose: The Master Plan Approval Phase provides for decision-maker review and adoption into City Policy.

6.01 Administrative Draft Master Plan Report Document

An administrative draft master plan report will be prepared complete with text, tables, photographs, maps, and graphics. This report will incorporate all of the information and recommendations generated through phases 1.0 through 4.0.

6.02 City Staff Meeting #4

The consultant will meet with City staff, review the draft document and receive direction for revisions.

6.03 Draft Master Plan Report Document

The document will be revised as necessary.

6.04 City Staff Meeting #5

Meet with City Staff to review the direction received from the Commission and finalize any changes needed.

6.05 Final Master Plan Document

The document will be revised and corrected as necessary, and submitted to City staff for distribution to the City decision-makers.

6.06 City Council Meeting #1

The Final Master Plan will be presented to the City Council for adoption.

6.07 Post-Approval Project Completion

The final document will be revised as necessary per Council comments. The document will be submitted to the City as one master original hardcopy and in electronic format for the City's use in future reproduction and distribution, and posting to the City web site.

7.0 Park Playground Accessibility and Safety Analysis

7.01 Playground Safety (CPSC) and Accessibility (ADA) Analysis

An analysis of current compliance with the Americans with Disabilities Act (ADA) and the CPSC (Consumer Product Safety Commission) regulations will be prepared by a David Spease, Certified Playground Safety Inspector. This task will include a detailed analysis for individual play facilities in the Milpitas park system to determine actions necessary to bring the playgrounds into conformance with current standards. This task is limited to an analysis of up to 20 individual play areas. Note that some parks may contain more than one play area, each of which would be counted as one individual play area.

8.0 Public Opinion Survey

8.01 Telephone Survey

See attached scope of services as prepared by Strategic Research Institute. The proposed compensation amount reflects the scope of services as described under Option 1A. This will include a sample size of 200, broken down into 4 geographic subsets of 50 each. The length of the interview will be 15 minutes. This will yield a sampling error of 5.5% to 7.0%.

CITY RESPONSIBILITIES

- Provision of a city-wide base map and aerial photograph suitable for depicting the park and recreation system, in electronic format.
- Provision of all available plans and/or construction documents for individual parks, trails, recreational buildings, and other facilities.
- Making all logistical arrangements for public workshops and meetings, including sending out notices, placing advertisements in local media, securing meeting spaces and payment of any fees, and providing refreshments if desired. Consultant will be responsible for all meeting materials such as graphics, PowerPoint presentations, hand-outs, name tags, comment sheets, etc.
- Promotion and hosting of a parks master plan page on the City's web site.
- Preparation of public announcements, web site pieces, or other public relations components.

**EXHIBIT B - Compensation
Harris Design
City of Milpitas
Parks Master Plan,
Project #5083**

Basic Services

	<u>Harris Design</u>	<u>SRI</u>	<u>Goldman</u>	<u>TSMG</u>	<u>Spease</u>	<u>Total</u>
Phase 1.0: Inventory and Analysis						
	\$20,000	\$0	\$0	\$8,800	\$0	\$28,800
Phase 2.0: Needs Assessment (Tasks 2.01 through 2.05)						
	\$9,600	\$0	\$0	\$13,600	\$0	\$23,200
Phase 3.0: Action Plan						
	\$21,000	\$0	\$0	\$4,500	\$0	\$25,500
Phase 4.0: Funding Plan						
	\$1,500	\$0	\$11,000	\$1,500	\$0	\$14,000
Phase 5.0: Maintenance Plan						
	\$8,000	\$0	\$0	\$0	\$0	\$8,000
Phase 6.0: Final Master Plan and Approval Process						
	\$20,200	\$0	\$0	\$3,850	\$0	\$24,050
Total Fees – Basic Services	\$80,300	\$0	\$11,000	\$32,250	\$0	\$123,550

Other Services

	<u>Harris Design</u>	<u>SRI</u>	<u>Goldman</u>	<u>TSMG</u>	<u>Spease</u>	<u>Total</u>
Phase 2.0: Needs Assessment (Task 2.06)						
	\$1,200	\$0	\$0	\$1,500	\$0	\$2,700
Phase 7.0: Playground Analysis (up to 20 individual play areas at \$525 per play area)						
	\$0	\$0	\$0	\$0	\$10,500	\$10,500
Phase 8.0: Telephone Survey						
	\$1,500	\$15,000	\$0	\$1,500	\$0	\$18,000
Total Fees – Other Services	\$2,700	\$15,000	\$0	\$3,000	\$10,500	\$31,200

Reimbursable Expense Allowance: Allowance for printing, delivery, workshop, supplies, graphic materials, and other direct project expenses as allowed by City policy \$5,000

TOTAL OF FEES AND EXPENSES \$159,750

Harris Design Standard Schedule of Fees and Expenses

Effective January 1, 2007 – December 31, 2007

PROFESSIONAL SERVICES

Principal	\$150/hour
Associate	\$120/hour
LA Staff 2	\$100/hour
LA Staff 1	\$80/hour
Administrative Staff	\$65/hour

REIMBURSABLE EXPENSES

Reproduction, delivery, photography, materials, equipment rental	Cost + 15%
Subcontract and subconsultant services	Cost + 10%

EXHIBIT C

CITY OF MILPITAS

Invoice or Claim Declaration

I, [name of declarant], declare the following:

_____ has contracted with City of Milpitas for the [name of project] project. I am authorized by my employer ([Consultant / Contractor company name]) to prepare the attached invoice or claim for compensation (in other words, for money and/or time extensions) to City regarding this project (dated _____, 200_, and requesting \$_____ and/or ___ additional working days), and I did prepare said attached claim. I am the most knowledgeable person at [Consultant company name] regarding this claim.

I am aware that this claim is covered by law, including but not limited to California Penal Code section 72, Government Codes sections 12650 et seq. (False Claims Act), and Business and Professions Code sections 17200 et seq. (Unfair Business Practices Act). I am aware that submission or certification of false claims, or other claims that violate law or the contract, may lead to fines, imprisonment, and/or other severe legal consequences for myself and/or [Consultant company name].

The attached claim is prepared and submitted in good faith, and to the best of my knowledge does not breach the contract between [Consultant / Contractor company name] and City for this project, does not violate any law, satisfies all provisions of the contract, only contains truthful and accurate supporting data, and only requests, an amount that accurately reflects the adjustments to money and time for which I honestly and in good faith believe that City is responsible under its contract with [Consultant / Contractor company name].

So that I could declare that the statements in this declaration and the attached claim were true and correct, while preparing this declaration and claim I consulted with others (for example, attorneys, consultants, or others who work for [Consultant / Contractor company name] when necessary to assure myself that said statements were true and correct.

I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed _____, 200_, at _____, California.

[name of declarant]

Budget # _____
 Refer # _____

City of Milpitas, California

BUDGET CHANGE FORM

Type of Change	From		To	
	Account	Amount	Account	Amount
Check one:				
<input checked="" type="checkbox"/> Budget Appropriation	321-9515083153899	\$50,000	321-951508314800	\$30,000
<input type="checkbox"/> Budget Transfer	320-2931	\$50,000	321-951508324800 320-3999	\$20,000 \$50,000

Explain the reason for the budget change:

In accordance with the City's consultant selection process, Harris Design has been selected to provide the required professional services to develop the Park Master Plan. The Park Master Plan will include these objectives:

1. Perform an in-depth inventory and condition assessment of the City's existing parks;
2. Determine anticipated future needs for new parks, and renovations of existing parks;
3. Determine needed upgrades, and ADA compliance requirements for existing parks;
4. Prioritizes improvements with cost estimates and timelines.

Staff has negotiated a scope and not to exceed fee of \$159,750, which is considered reasonable for the work. A budget appropriation in the amount of \$50,000 from the Park Fund is required for the agreement.

Approve the budget appropriation of \$50,000 from the Park Fund to Park Master Plan Project (5083) for professional services to develop the plan.

Check if City Council Approval required. Meeting Date: August 7, 2007

Itemization of funds, if needed:		Amount
Requested by:	Division Head:	Date:
	Department Head:	Date: 7/25/07
Reviewed by:	Finance Director:	Date: 7/25/07
Approved by:	City Manager:	Date:
Date approved by City Council, if required:		Confirmed by: