

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF MILPITAS APPROVING AN AGREEMENT WITH TECOGEN FOR MAINTENANCE AND REPAIR SERVICES FOR THE SPORTS CENTER COGENERATION FACILITIES

WHEREAS, Section I-2-3.09 of the Milpitas Municipal Code authorizes the City Council to award contracts without competition when the Purchasing Agent determines that there is only one source for the required supply or service; and

WHEREAS, Tecogen is the only manufacturer and installer of the cogeneration equipment purchased for the Sports Center and, thus, the only provider of maintenance and repair for the equipment; and

WHEREAS, Tecogen has been providing services to the City since 1992 when the equipment was installed and the original service contract expired in 1997. Tecogen has been providing the services without a formal contract since 1997; and

WHEREAS, after conducting a good faith review of the available sources and pursuant to Milpitas Municipal Code Section I-2-3.09, the City’s Purchasing Agent has determined that Tecogen is the only source for maintenance and repair of the cogeneration equipment at the Sports Center.

NOW, THEREFORE, the City Council of the City of Milpitas hereby finds, determines, and resolves as follows:

1. The City Council has considered the full record before it, which may include but is not limited to such things as the staff report, testimony by staff and the public, and other materials and evidence submitted or provided to it. Furthermore, the recitals set forth above are found to be true and correct and are incorporated herein by reference.
2. The City Manager is authorized to execute a contract as a sole source for maintenance and repair services for the cogeneration equipment at the Sports Center with Tecogen, not-to-exceed \$15,000.00 per year for three years with two, one-year renewal options.

PASSED AND ADOPTED this _____ day of _____, by the following vote:

AYES:

NOES:

ABSENT:

ABSTAIN:

ATTEST:

APPROVED:

Mary Lavelle, City Clerk

Robert Livengood, Mayor

APPROVED AS TO FORM:

Michael J. Ogaz, City Attorney



SHORT FORM PURCHASE OF SERVICE CONTRACT

The parties to this Short Form Purchase of Services Contract (Contract) do mutually agree and promise as follows:

1. **Parties.** The parties to this Contract are the CITY OF MILPITAS, CALIFORNIA, a municipal corporation (City) and the following named Contractor: **Tecogen**

(Contact Name) **William R. Martini**
(Street Address) **2245 NW 111th Ave**
(City/State/Zip Code) **Portland, OR 97229**
(Telephone) **503-641-1768**
(Email Address) **William.martini@tecogen.com**
(Fax Number) **503-641-2689**
(Taxpayer ID #) **04-3536131**
(Milpitas Business License #)

2. **Term.** The effective date of this contract is **January 1, 2009 thru January 1, 2012 with two (2) additional one (1) year options**, unless sooner terminated as provided herein.

3. **Payment Limit.** City's total payments to Contractor under this contract shall not exceed: **\$15,000.00 per year.**

4. **Contractor's Obligations.**

(a) To the satisfaction of the City's Project Manager, Contractor shall provide the following services: **See: attached "Maintenance Agreement Tecogen Cogeneration Systems"**

(b) Contractor shall perform the above-referenced services at the following specified location/s:

**City of Milpitas
Sports Center
1325 E. Calaveras Blvd.
Milpitas, CA 95035**

(c) Name or type of service:
Maintenance and repair labor.

5. **City's Obligations.** City shall pay Contractor as follows: **not-to-exceed \$15,000.00 per year total payment for all services rendered.**
(See attached: Maintenance Agreement Tecogen Cogeneration Systems written quote.)

6. **Supplemental Conditions.** This Contract is subject to the Supplemental Conditions attached hereto, which are incorporated herein by reference.

7. **Signatures.** These signatures attest the parties' agreement hereto:

CONTRACTOR:

Name and Title

CITY OF MILPITAS, CALIFORNIA
a municipal corporation:

By: _____
City Manager

Approved as to form:

By: _____
City Attorney

Approved as to content:

By: _____
City Project Manager

Approved as to Insurance:

By: _____
City Risk Manager

Prepared by City Purchasing Agent

SUPPLEMENTAL CONDITIONS

1. Independent Contractor. It is expressly agreed that Contractor is to perform the services described herein as an independent contractor pursuant to California Labor Code Section 3353, under the control of the City as to the result of his work only but not as to the means by which such result is accomplished. Nothing contained herein shall in any way be construed to make Contractor or any of its agents or employees, an agent, employee or representative of the City. Contractor shall be entirely responsible for the compensation of any assistants used by Contractor in providing said services.
2. Termination. This Contract shall automatically terminate when the total accumulated compensation paid or due to Contractor under this Contract reaches \$75,000.00. The City shall not be responsible for compensating Contractor for any amounts in excess of \$75,000.00.
3. Cancellation. Either the City or Contractor may cancel this Contract at any time upon giving the other party five (5) days' written notice of such cancellation. In the event of cancellation, the City shall be liable only to pay to the Contractor compensation for services rendered up to the date of the Contract's cancellation.
4. Assignment. Contractor shall not assign this Contract, or any part thereof, or any right of the Contractor hereunder without the prior written consent of the City.
5. Indemnity. Contractor shall indemnify, defend and hold the City harmless from and against all claims, demands and causes of action for injury, death or damage to any person or property which may arise or result from the contractor's performance of this Contract or from acts or omissions of any person(s) employed by Contractor.
6. Anti-Discrimination. Contractor agrees to observe the provisions of the City of Milpitas Standard Operating Procedure 16.8 "Anti-Discrimination Policy" and Title VII of the Civil Rights Act of 1964, obligating every contractor or subcontractor under a contract or subcontract to the City of Milpitas for public works or for goods or service to refrain from discriminatory employment practices on the basis of the race, color, sex, sexual orientation, religious creed, national origin or ancestry of any employee of, or applicant for employment with, such contractor or subcontractor.
7. Business License. Pursuant to the City of Milpitas Municipal Code, Title III Business and Professions, Section 1-4.01 Requirement and Special Exemptions ... "it shall be unlawful for any person to transact and carry on any business, trade, profession, calling or occupation in the City of Milpitas without first having procured a license from said City ..."
8. Insurance. During the entire term of this Contract and any extension or modification thereof, the CONTRACTOR shall keep in effect insurance policies meeting the following insurance requirements: **See Exhibit A, Insurance Requirements - General**

9. The "Maintenance Agreement TECOGEN Cogeneration Systems" agreement attached is hereby incorporated into and made a part of this agreement with the following changes to the TERMS & CONDITIONS OF MAINTENANCE:
- A. Item one, GENERAL, paragraph two is stricken.
 - B. Item nine, LIMITATIONS OF LIABILITY, sentence two, delete "shall not exceed the maintenance service charge received by Seller prior to the determination of such liability." And replace it with "shall not exceed the proceeds of insurance."
 - C. Item eleven, OTHER, paragraph two is stricken.
 - D. Item eleven, OTHER, the last sentence, delete "Commonwealth of Massachusetts", and replace with "State of California".



45 First Avenue, Waltham, MA 02154
ph: 781-466-6400 fax: 781-466-6466

TECOGEN'S SERVICE & MAINTENANCE PROGRAM

Tecogen's factory service program has been very popular with its customers over the years. Almost every site has elected to participate in this optional factory program since the mid-1980's.

This comprehensive program covers much more than a conventional warranty does. It basically covers anything required by the "blue box", including:

- all scheduled maintenance (preventative maintenance, or P.M., including oil changes, plugs, tune-ups, etc.)
- all unscheduled service
- all major parts replacements, including engine and generator replacements, as needed
- all parts, labor, mileage, and consumables
- coverage of both defects and normal wear-and-tear.

The final page of attached sample agreement provides a more detailed breakdown ("schedule") of what regular scheduled service consists of. This is similar to what one would find in a car's owner's manual.

Typical contract terms are three to five years, but other terms are possible, of course.

All work is performed by locally based, fully trained, *factory* technicians. Work is done by Tecogen, the manufacturer, not by third parties.

Also, the agreement is structured so that Tecogen's maintenance charges are based on the system's *actual* run-hours. This simple structure is intended to keep Tecogen's interests aligned with a site's. In other words, if the unit(s) aren't running for a site, no charges are incurred. Maintenance billings are completely linked to the actual run-time of the units. This is a very fair way to structure the program. If the system runs a lot, then the quarterly bill goes up. If the system runs less or is off, then the quarterly maintenance charge goes down.

This linkage helps ensure that the energy cost savings a customer receives from the system are always much greater than the maintenance charges.

To put the maintenance program into effect, a customer simply needs to sign an agreement and return it to Tecogen.

45 First Avenue, Waltham, MA 02451
 phone: 781.466.6400, fax: 781.466.6466

FOR OFFICE USE ONLY 070188
JOB NO. _____
MODEL NO. _____

Maintenance Agreement
TECOGEN® Cogeneration Systems

BUYER:	SITE:
CORPORATE NAME: <u>City of Milpitas</u>	CORPORATE NAME: <u>Milpitas Sports Center</u>
STATE OF INCORPORATION: <u>CA</u>	STATE OF INCORPORATION: <u>CA</u>
ADDRESS: <u>Attn: Public Works Dept.</u> <u>1265 N. Milpitas Blvd., Milpitas, CA 95035</u>	ADDRESS: <u>1325 East Calaveras Blvd.</u> <u>Milpitas, CA 95035</u>
CONTACT: <u>Ed Loredo, Facilities Maint Spvr</u>	CONTACT: <u>Primary: Ed Loredo [Secondary, at site:</u> <u>Aaron Bueno or Kerry Ely, Recn Spvrs]</u>
PHONE/FAX: <u>ph 408-586-2662; main -2600; fax -2610;</u> <u>e-mail: eloredo@ci.milpitas.ca.gov</u>	PHONE/FAX: <u>[Site: Aaron B., 408-586-3226; main -3225]</u>

EQUIPMENT DESCRIPTION
a. QUANTITY: <u>One (1) TECOGEN® Cogeneration Module(s)</u>
b. MODEL #(s): <u>TECOGEN CM-60</u>
c. SERIAL #(s): <u>200326</u>

SERVICE CHARGE
The maintenance service charge for each Cogeneration Module for the first 12-month period of the Maintenance Agreement shall be an amount equal to a flat rate of <u>\$ 2,275</u> times the number of hours of operation of each Cogeneration Module during the 12-month period.

TERMS OF PAYMENT
Buyer will pay the Maintenance Service charge in advance on a quarterly basis, provided that the first payment shall not be due until 30 days following the commencement of operation of each module. The amount of each quarterly payment shall be based on an assumed 1500 hours of operation by each cogeneration module during the quarter.
Seller will calculate an adjustment within 30 days following the end of each quarter to reflect the difference between the actual number of hours of operation during the quarter and the assumed 1500 hours of operation. Seller will pay Buyer the appropriate adjustment amount in the event that the actual operation is less than 1500 hours during the quarter. Buyer will pay Seller the appropriate additional amount in the event that the actual operation exceeds 1500 hours during the quarter. All adjustment amounts will be paid within 15 days following notice from Seller to Buyer setting forth the adjustment calculation.

DURATION OF AGREEMENT: (<u>12</u>) MONTHS	EFFECTIVE DATE: <u>1/1/09</u>
<input checked="" type="checkbox"/> Auto Renewal thereafter, with 90 day written notice to cancel.	

NOTES: <u>1. Agreement covers complete Tecogen unit ("the blue box"). 2. Agreement does not cover external "system" components (i.e., HX's, radiator, silencer, expansion tank, relay, gas regulator, mixing valves, pumps, external controls/ relays, meters, fans, phoneline, piping, etc.).</u>

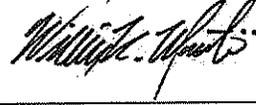
Attached addendum forms part of this agreement.
 The Maintenance Agreement on the above equipment is further governed by the Terms and Conditions of Maintenance for TECOGEN Cogeneration Systems (attached) which forms an integral part of this agreement.

ACCEPTED AND AGREED TO BY:

(Buyer)

BY: _____
NAME: _____
TITLE: _____
DATE: _____

TECOGEN Inc.
(Seller)



BY: _____
NAME: William R. Martini
TITLE: District Manager
DATE: 3/13/09

TERMS & CONDITIONS OF MAINTENANCE
TECOGEN Cogeneration Systems

1. **GENERAL.** The Terms and Conditions stated herein shall, together with the attached Maintenance Agreement, form the agreement for maintenance of one or more TECOGEN Cogeneration Module(s) by a Buyer (Buyer) from TECOGEN (Seller).

By its signature hereto, the Buyer agrees that the provisions of this Agreement shall supersede any term or condition regarding maintenance set forth in any purchase order, contract, or other document delivered by the Buyer to the Seller.

This agreement covers only the Cogeneration Module(s) or portion(s) of the Cogeneration Module(s) specified in the attached SERVICE CHARGE section of the Maintenance Agreement and manufactured by Seller and not the associated installed equipment.

2. **TERM.** The maintenance period under this maintenance agreement shall be as set forth in the DURATION OF AGREEMENT section and shall begin on the earlier of commencement of operation of the Cogeneration Module(s) or 6 months following shipment of the Cogeneration Module(s), unless otherwise stated.
3. **SERVICE ESCALATION.** Seller will increase the maintenance service charge rate on each anniversary of the commencement date of the maintenance period of this Maintenance Agreement by a factor equal to (1) the rate of increase in the Consumer's Price Index as published by the U.S. Government for the year immediately preceding, plus 2%.
4. **ACCESS.** Buyer will allow Seller and Seller's representatives access to the Cogeneration Module(s) during regular business hours to perform scheduled and unscheduled maintenance and to make periodic inspections of the Cogeneration Module(s).
5. **SCHEDULED MAINTENANCE SERVICE.** Seller's representatives shall make routine maintenance visits to the Buyer's Cogeneration Module facility at least once in every 1,000 hours of operation, or at intervals prescribed in its "TECOGEN Service Interval Guideline", whichever is greater. Seller reserves the right to modify this guideline, including services performed and service intervals, at any time during the Agreement period at its discretion.

Buyer shall notify Seller no less than five (5) days in advance of the passage of each 750 hours of operation for each module. In the event that the unit is equipped with the Tecogen Remote Monitoring and Control System option (RMCS), this Buyer requirement is waived, so long as Buyer maintains at his expense a working telephone line and allows Seller telephone access to the Cogeneration Module(s).

6. **UNSCHEDULED REPAIR SERVICE.** Seller responsibilities for unscheduled service repair shall be as follows:

In the event of a breakdown, malfunction, or failure of the Cogeneration Module(s), Buyer shall promptly notify Seller of such event and Seller shall use its best efforts to repair the Cogeneration Module(s); provided, however, that if such breakdown, malfunction, or failure results from any of the exclusions set forth in this Agreement, Buyer shall reimburse Seller for all service charges paid to repair the Cogeneration Module(s) at the prevailing rate per hour of serviceperson time (shop-to-shop), plus all travel expenses and material costs paid. Any service performed after 5:00 p.m. will be charged at time and one-half and any service performed on Sundays will be charged at double time.

Also, in the event of a breakdown, malfunction, or failure of any equipment or any part thereof *outside* the Cogeneration Module(s), Buyer will promptly notify Seller of such event.

Buyer shall not, during the term of this Maintenance Agreement, without the prior written consent of Seller, allow any person other than Seller or Seller's representative to perform any maintenance service, repairs, or adjustments to the Cogeneration Module(s). However, those activities performed by the Buyer's designated maintenance specialist for the Cogeneration Module(s), where such activities are performed under the supervision of, or at the express request of, representatives or service personnel of Seller, shall be permitted.

The Seller's responsibilities for unscheduled repair shall not extend to items not part of the Cogeneration Module(s), unless such coverage is explicitly stated on the front of this agreement as included.

7. **EXCLUSIONS.** This Maintenance Agreement does not cover any maintenance or repair to any Cogeneration Module(s) that results in whole or in part from:
- willful damage, misconduct, or negligence of Buyer, its employees, agents or invitees;
 - fire, theft, or other risks now or hereafter normally covered by an "all risks" policy of insurance, including extended coverage;
 - war, riots, civil commotion, flood, storm, earthquake, or any similar event;
 - any alteration, addition to, substitution, or replacement of any part of the Cogeneration Module(s) or related electrical, plumbing, or fuel connection not authorized by Seller;

- adjustment, maintenance, service, or repair to the Cogeneration Modules(s) or related electrical plumbing or fuel connections not authorized by Seller;
- any use of the Cogeneration Module(s) in any manner other than its designed use;
- improper installation of the Cogeneration Module(s) by anyone other than Seller or Seller's authorized representatives;
- Buyer's failure to keep the Cogeneration Module(s) protected from the weather or elements;
- Buyer's failure to perform any covenant contained in this Maintenance Agreement.

8. **PARTS REPLACEMENT.** Buyer agrees that upon replacement of any parts, lubricants, refrigerants, components, or other materials by Seller during the term of this Maintenance Agreement, the corresponding items removed shall become the property of Seller.

The engine(s) contained in the Cogeneration Module(s) will be repaired or replaced as necessary to correct mechanical defects or failures of an engine. The cost of engine replacement or repair is included in the maintenance service charge. In the event of engine replacement, Seller will supply a similar new engine or, for engine with removable cylinder liners, a similar rebuilt engine. The replaced engine that is removed from the Cogeneration Module shall become the property of Seller.

9. **LIMITATIONS OF LIABILITY.** In no event shall Seller or its agents be liable for any indirect, incidental, consequential, or special damages, including but not limited to loss of use or anticipated profits, whether in an action on contract or tort. The maximum liability of Seller to Buyer under this Agreement shall not exceed the maintenance service charge received by Seller prior to the determination of such liability.

10. **ACCEPTANCE.** All orders for maintenance are subject to acceptance in writing by an authorized employee of Seller.

11. **OTHER.** The terms of this Agreement shall be binding upon and inure to the benefit of the successors and assigns of each of the parties hereto. Except as set forth herein, neither party shall assign any of its rights or delegate any of its duties hereunder without the prior written consent of the other.

The Maintenance Agreement including these Terms and Conditions sets forth the entire understanding of the parties regarding maintenance service of Cogeneration Module(s) and supersedes all prior agreements, communications, representations or warranties, whether oral or written, by an officer, employee or representative of either party regarding such maintenance service.

Any performance or covenant under this Agreement may be waived in writing signed by both parties. No waiver by either party of any default shall operate as a waiver of any other default or of the same default on a future occasion.

Any change in the terms of this Agreement must be in writing and signed by both parties.

Buyer and Seller agree that if any provision of this Agreement is held by any court to be illegal or unenforceable, the remaining provision shall, to the extent practicable, remain in full force and effect.

This agreement shall be construed and enforced in accordance with the laws of the Commonwealth of Massachusetts.

12. **TERMINATION.** This agreement may be terminated by either party upon 90 days written notification to the other party.
13. **SUSPENSION.** Service under this Agreement will be suspended upon written notification by Seller to Buyer if maintenance fees are in arrears.
14. **ADDITIONAL CHARGES.** In addition to the maintenance service charge set forth, Buyer shall also be responsible for the charges incurred as follows:
- Any outside rigging charges shall be billed to Buyer at cost.
 - Any outside agency emissions testing charges shall be billed to Buyer at cost.
 - Any maintenance or service covered by this Agreement requested by Buyer to be performed outside normal business hours shall be billed to Buyer at the difference between regular and overtime hourly rates then in effect.
 - This Agreement only covers maintenance for the TECOGEN equipment specified. Buyer will be billed for any requested service calls and work due to problems outside the TECOGEN equipment at Seller's prevailing Time and Material Rates, including travel time, mileage, and actual hours worked. Seller will not exceed two hours of diagnosis and/or corrective work without the express approval of Buyer.

15. **COLLECTIONS.** Buyer agrees to pay all cost and expenses of collections, including all Attorneys' fees incurred up to the maximum permitted by applicable law.

(Sample)
TECOGEN® CM-60/ CM-75
 Scheduled Service Interval Guidelines

Category	Interval	Item	Action
A	750 Operating Hours	Engine Lube Oil Engine Oil Filter Air Filter ¹ Air Inlet Louver Enclosure Fan PCV Valve Battery Timing Carburetor Spark Plugs Coupling Engine Mounts Condensate Trap General Safety Circuit ²	Replace Replace Replace Clean Inspect and Clean Inspect Inspect and Clean Terminals Check & Adjust if Necessary Check & Adjust if Necessary Replace Inspect Inspect Clean Check for Leaks, Check Electrical Connectors Verify Operation (DSHT, PSHT, EXHT)
B	2250 Operating Hours	<u>A Items</u> Distributor Cap Rotor Distributor Ignition Wires PCV Valve Engine Evaluation Engine Valves O ₂ Sensor ⁴	See above Replace Replace Check for Shaft Bushing Wear Replace Replace Blowby & Compression Test (Omit on First "B" Service) Adjust Replace
C	6000 Operating Hours or Annually	Generator Cylinder Heads Catalyst ⁴ "A" & "B" Items	Grease Bearings Replace (if necessary) Inspect, Wash or Replace every other interval (i.e., 12,000 hrs) See Above
D	Typical Life ³	Engine, Partial	Replace as indicated by Blowby and Compression Tests

Notes:

1. A dusty environment may require more frequent service for air filter.
2. The Safety Circuit acts as a redundant safety to ensure safe shutdown in the event of a microprocessor failure.
3. Typical engine life with proper service is 20,000-25,000 operating hours.
4. Applies only to units equipped with the TecoDrive Emission Control System.