

DRAFT

**CONSULTING SERVICES AGREEMENT BETWEEN
THE CITY OF MILPITAS AND
Gates & ASSOCIATES**

THIS AGREEMENT for consulting services is made by and between the City of Milpitas and the Milpitas Redevelopment Agency, collectively referred to herein as the ("City"), and Gates & Associates ("Consultant") as of June 16, 2009.

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 June 30, 2010, 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 standards observed by a competent 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 standards of quality normally observed by a person practicing in Consultant's profession.

1.3 Assignment of Personnel. Consultant shall assign only competent personnel to perform services pursuant to this Agreement. Exhibit A shall name any specific personnel 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.

1.4 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 1.1 above and to complete Consultant's obligations hereunder.

Section 2. COMPENSATION. City hereby agrees to pay Consultant a guaranteed maximum price for time and materials one hundred ten thousand dollars (\$110,000.00) for all services to be

performed and reimbursable costs incurred under this Agreement. A contingency amount of three thousand five hundred thirty five dollars (\$3,535.00) is included in the agreement for additional services as required. This contingency amount may not be used without the express written authorization of the City. Fees for approved work performed by Consultant shall not exceed the amounts shown on Exhibit B.

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. 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;
- The beginning and ending dates of the billing period;
- A Task Summary containing the 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;
- 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 agreement billing until the completion of the agreement unless authorized differently by the 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.

- 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 three thousand dollars (\$3,000.00). 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.

- 2.6 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.

2.7 **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.

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.

4.2 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 to the policy:

- a. City (i.e., both the City of Milpitas and the Milpitas Redevelopment Agency) 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 FOUR MILLION DOLLARS (\$4,000,000) 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 require a written amendment to this Agreement, as provided for herein. Consultant understands and agrees that, if City grants 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, 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.

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 Contract Administration.** This Agreement shall be administered by Julie Waldron 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.

10.10 Notices. Any written notice to Consultant shall be sent to:

David Gates
Gates + Associates
2671 Crow Canyon Road
San Ramon, CA 94583

Any written notice to City shall be sent to:

Greg Armendariz
455 East Calaveras Boulevard
Milpitas, California 95035

10.11 Professional Seal. Where applicable in the determination of the City, the first page of a technical report, first page of design specifications, and each page of construction drawings shall be stamped/sealed and signed by the licensed professional responsible for the report/design preparation.

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/RDA Director

ATTEST:

Mary Lavelle, City Clerk/Agency Secretary

Taxpayer Identification Number

APPROVED AS TO FORM:

Michael J. Ogaz, City Attorney/Agency Counsel

APPROVED AS TO CONTENT:

Greg Armendariz, Public Works Director/City Engineer

APPROVED:

Emma Karlen, Finance Director/Risk Manager

EXHIBIT A

SCOPE OF SERVICES FOR CARDOZA PARK PLAYGROUND RENOVATIONS AND ELECTRICAL CABINET UPGRADES PROJECT NO. 5088 & 5085

Rev 06-08-09

ASSUMPTIONS:

- City will provide construction administration assistance services.
- City will provide aerial photo for developing base maps and topographic survey.
- City provided arborist report
- SWPPP, and Erosion Control Plans shall be provided by the Contractor.
- Consultant shall assist City with NOI to accompany SWPPP
- Restroom and ball field lighting are not a part of Phase I.
- Final Concept Plan shall consider C-3 Stormwater Management into opportunities and constraints and Milpitas Landscape Ordinance 238.

TASK 1 – CONCEPT DESIGN

The objectives of this task are to gain an understanding of project issues through document review, working with staff and field reconnaissance to develop a comprehensive Final Concept Plan for the park which addressed expanding recreation needs of the community; and to identify a Phase I project that is consistent with available \$1,000,000 construction budget. Project also includes electrical cabinet upgrades at Cardoza, Hall and Creighton Park with a \$90,000 construction budget.

SubTask 1.1 Project Initiation and Program

- Meet with City staff to review project goals and special issues. Verify regulatory items, approval process and other administrative procedures.
- Prepare a project schedule.
- Clarify program based on proposed improvement plan to further define and obtain information (amenities, preferred play equipment, etc.).

Sub Task 1.2 Existing Document Review

- Review existing plans, utilities connections and other information available for the project site, all as provided by the City. The City will provide the following:
 - Available as built drawings
 - Utility plat maps
 - Tree survey

SubTask 1.3 – Field Reconnaissance

- Conduct site investigation to assess existing conditions, condition of existing paving, health of existing vegetation, relationship to adjacent community, ADA access issues, lighting levels, etc.
- Verify the presence of existing utilities and points of connection based on surface evidence.
- Gain an understanding of existing irrigation system

SubTask 1.4 – Geotechnical Survey

Geotechnical Investigation shall provide recommendation for pavement sections and building structures as proposed for the park Final Concept Plan

SubTask 1.5 - Alternate Concept Plans

Using program elements and findings from field reconnaissance to prepare (3) concept plans illustrating an ultimate configuration for park. including:

- Overall site layout indicating park character, paths for ADA access and maintenance, fencing, picnic area, play area and other features.
- Prepare a preliminary Cost Estimate for each alternate
- Illustrate Phase I improvements for each option.

SubTask 1.6 – Concept Review

- Meet with City Team to review issues associated with each proposed concepts and identify preferred alternate or combination.

SubTask 1.7 – Final Concept Plan and Phase I

- Develop Final Concept Plan Graphic for Park with Phase One identified based on City priorities and fixed construction budget.
- Phase One Improvements shall be delineated with staff based on budget and priorities. Preferred Phase One improvements include the following:
 - Address safety and ADA compliance issues
 - Removal of the two existing playground areas
 - Installation of three new play areas
 - DG pathways to concrete to provide ADA accessibility to playground and picnic areas and new amphitheater location
 - Safety and security lighting throughout park
 - Removal of the existing amphitheater
 - Expansion of picnic areas on both the east and west sides of the park including large group and individual BBQ's
 - Associated landscape and irrigation
 - Provide for water efficient plant material and irrigation system
 - Upgrade or replacement of electrical cabinet and similar electrical cabinet replacement/upgrades at Hall Park and Creighton Park

PRODUCTS:

(3) Concept Plans (per SubTask 1.6) and 1 Cost estimate per

concept
Final Concept Plan with Phase I Delineated
Estimate of Probable Cost for Phase One Construction

MEETINGS:

Staff 2

**TASK 2 – PHASE I
PRELIMINARY DESIGN**

The objective of this task is to develop design plans for Phase I, develop cost estimates, and obtain necessary approvals and permits.

**SubTask 2.1 –
Phase I Kick-Off**

Meet with staff to review Final Concept Design and Phase I project scope. Identify any refinements to be addressed in construction document.

**SubTask 2.2 –
Supplemental
Survey**

Based on Aerial Photo provided by the City, supplemental detailed field topographic mapping will be provided as necessary for design purposes to supplement the aerial photo. Survey shall include:

- Tree trunk location corresponding to tree survey,
- Tree canopy (typically correlates to primary root zone)
- At grade utilities and data from utility plat maps to show existing underground utilities

One day of field work and related office time associated with this task.

*SubTask 2.3 –
Horticultural Soils
Testing and
Recommendations*

Collect soil samples for horticultural soils analysis and provide recommendations for ornamental planting of turf, ground cover, shrubs, new and existing trees and; maintenance during establishment period. Determine if horticultural testing is required for petroleum and pesticide and provide radish test if necessary.

*SubTask 2.4 - Design
Plans (50% Submittal)*

- Prepare preliminary design for Phase I plans including:
- Preliminary layout of Phase I improvements in relation to existing features.
 - Preliminary grading plans/strategy for storm water and ADA Compliance.
 - Preliminary planting plans.

- Sketches / images of proposed site features, lighting, and materials.
- Prepare an enlargement of key areas such as new play areas, picnic areas, amphitheater, etc.
- Prepare Outline Technical Specifications
- Incorporate stormwater treatment measures consistent with C-3 and Landscape ordinance 238
- Prepare Estimate of Probable Construction Costs, identify any value engineering items.

**SubTask 2.5 -
Estimate of
Probable Costs**

**SubTask 2.6– Staff
Review**

- Meet with City staff to review 50% submittal, estimate and value engineering options.
- At this meeting, review all major proposed materials, surfaces, design elements and treatments including maintenance implication and park theme.

*SubTask 2.7 – 95%
Submittal*

Incorporate City comments and prepare construction documents for 95% submittal using standard city title block. Submittal shall be suitable for building department approval and in compliance with the Public Contract Code for public bidding. Plans shall include:

Title Sheet

Civil:

- Demolition Plan
- Utility Plan and Details
- Grading and Drainage Plan and Details

Landscape:

- Site Layout Plan and Construction Details
- Planting Plan and Details
- Irrigation Plan and Details
- Layout Enlargements and/or cross sections of plaza area play area, picnic areas, etc.

Electrical:

- Lighting and Electrical Plan and Details at Cardoza Park

- Lighting levels shall be a minimum of .5 foot candles for all walking surfaces.
- Provide Lighting Photometrics for City approval
- Electrical Plan and Details for: upgrade or replacement of electrical cabinet at Hall Park and Creighton Park

Prepare Design Calculations and drawings.

SubTask 2.8 – Technical Specifications

- Prepare specifications using the City provided front end document – Sections A, B, C, D and some Technical Specifications (E) supported by consultant specifications, in conformance with Caltrans.
- Specifications shall include measurement and payment wording. The Consultant shall coordinate the inclusion of the technical specifications into the front end specifications as one packet.
- The Consultant shall provide estimated construction costs in the form of the contractor bid proposal format.
- Unit cost items shall be used whenever possible
- The construction schedule shall be specified in working days or calendar days as approved by the City
- Meet with City Staff to review comments.

SubTask 2.9 – Estimate of Probable Costs

- Prepare Estimate of Probable Construction Cost

**SubTask 2.10–
Permit
Applications and
Approvals**

Coordinate and assist in obtaining permits and project approvals from other agencies (Utility Company and Building Department) as required by the project. City will pay necessary fees.

- This shall include coordination with utility companies including submittal of all necessary service applications. Consultant shall provide all necessary information requested by utility companies. Consultant shall incorporate all utility company comments into the design. Consultant shall update project schedule with utility company review and approval times.
- Consultant shall prepare all submittals for Building Department permit review and approval as required. Consultant shall respond to all Building Department comments to receive Building Department approval as required.

SubTask 2.11– Staff Review

- Allow three weeks for staff review of 95% PS&E submittal.
- Meet with City staff to review 95% PS&E submittal

SubTask 2.12 – PRCRC & City Council Presentation

Provide power point program for City staff to present to PRCRC and City Council. Gates shall attend meetings to answer any questions from Commission or Council.

PRODUCTS:

50% and 95% PS&E – 5 hard copy sets
 Design Calculations and Drawings
 PG&E Permit Application
 Building Department Application
 PRCRC Power Point Presentation
 Schedule and Engineer Sheet

MEETINGS:

Staff	3	
PRCRC & City Council Meetings		2 (total)

TASK 3 – PHASE I FINAL DESIGN

The objective of this task is to prepare final construction documents that are quality controlled and coordinated to minimize construction issues.

SubTask 3.1 – Final 100% Submittal

- Complete construction plans and specification and estimates to Final Design (100%) level.
- Deliver set of conformed construction drawings specifications and estimates in both reproducible and electronic media.

SubTask 3.2 – Quality Control

- Design and calculations are independently checked, corrected and back checked to provide assurance of complete coordination and compatibility between the plans, specifications and estimated quantities.
- Coordinate different disciplines, efforts to assure that conflicts and misalignments do not exist.
- QC program shall include field reviews and review of all pertinent materials to assure compatibility of design with existing facilities.
- Provide a QA/QC statement signed by a principal with final submittal.

SubTask 3.3– Staff Review

- Allow three weeks for staff review and wet signatures of City Staff for 100% PS&E submittal.

PRODUCTS:

Final Signed Document on Reproducible hard copy and Electronic file
QA/QC statement

MEETINGS:

Staff 1

TASK 4 – BIDDING

The objective of this task is to support City during the bid process and prepare a final construction set that incorporates issues identified during bid process.

SubTask 4.1 – Bidding Support Phase I

The Consultant Team will assist the City during the bid process by:

- Attend and assist at 2 pre-bid meetings.
- Response to bidder inquires.
- Assist in evaluating bids.
- Interpretation of plans and specifications for bidders.
- Prepare technical aspects of addenda to be issued by the City as necessary.
- Prepare conform set incorporating addenda in a timely manner.

PRODUCTS:

Conform Set – 3 hard copy and 1 electronic copy (CD)

MEETINGS:

Pre-Bid Meetings 2

TASK 5 – CONSTRUCTION ADMINISTRATION

The objective of this task is to assist the City during the project construction, as needed.

SubTask 5.1 – Construction Administration

Tasks may include:

- Attendance at pre-construction meeting.
- Submittal review (shop drawings, samples, product information).
- Respond to Request for Information.
- Attend construction progress meetings (assume 14 weeks construction).
- Prepare field notes from each site review.
- Conduct pre-maintenance walk through.
- Document punch-list items.
- Conduct a final walk through to start maintenance period.
- Prepare change order and field directions.

*SubTask 5.2 –
Playground Audit and
Certification*

Prepare an audit of the play structures and Certification of Compliance by a NPSI Certified Playground Inspector.

MEETINGS:

Pre-Construction Meeting 1
Weekly Construction Field Meetings allow up to 14
Pre-Maintenance & Final Walk Thru 2

Playground Audit and Certification

**TASK 6 – PHASE I
RECORD DRAWING**

The objective of this task is to provide accurate as-built plans in a reproduction format.

*Sub Task 6.1 – Record
Drawings*

Prepare and sign record drawings based upon contractor

- Submit as-builts within 25 days for Staff review
- Revise as requested by City (one set of revisions)
- Resubmit Final record drawings

PRODUCTS:

Draft Record Drawings (1 set)
Record Drawings – Hard Copy on Mylar (1 set) & electronic copy (CD)

MEETINGS:

Meetings 0

**TASK 7 – ELECTRICAL
CABINETS**

Upgrade or replacement of electrical cabinet at Cardoza Park and similar electrical cabinet replacement/upgrades at Hall Park and Creighton Park. Included with submittals for Cardoza Park and as specifically noted in Subtask 2.6 above.

PROGRESS SCHEDULE
Cardoza Park Playground Renovation, Milpitas

2009

2010

	May	June	July	Aug	Sept	Oct	Nov	Dec	Jan	Feb	Mar	April	May	June
TASK 1 - CONCEPT DESIGN														
SubTask 1.1 Project Initiation and Program														
SubTask 1.2 Existing Document Review														
SubTask 1.3 Field Reconnaissance														
SubTask 1.4 Geotechnical Survey														
SubTask 1.5 Alternate Concept Plans														
SubTask 1.6 Concept Review														
SubTask 1.7 Final Concept Plan and Phase One														
TASK 2 - PHASE I PRELIMINARY DESIGN														
SubTask 2.1 Phase I Kick-Off														
SubTask 2.2 Supplemental Survey														
SubTask 2.3 Horticultural Soils Test & Recs														
SubTask 2.4 Design Plans (50% submittal)														
SubTask 2.5 Estimate of Probable Cost														
SubTask 2.6 Staff Review														
SubTask 2.7 95% Submittal														
SubTask 2.8 Technical Specifications														
SubTask 2.9 Estimate of Probable Cost														
SubTask 2.10 Permit Applications and Approvals														
SubTask 2.11 Staff Review														
SubTask 2.12 PRRC and City Council Presentation														
TASK 3 - PHASE I FINAL DESIGN														
SubTask 3.1 Final 100% Submittal														
SubTask 3.2 Quality Control														
SubTask 3.3 Staff Review & Signing														
TASK 4 - BIDDING														
SubTask 4.1 Bidding Support Phase I														
TASK 5 - CONSTRUCTION ADMINISTRATION														
SubTask 5.1 Construction Administration														
SubTask 5.2 Playground Certification and Inspection														
TASK 6 - PHASE I RECORD DRAWING														
SubTask 6.1 Record Drawings														
TASK 7 - ELECTRICAL CABINETS														
SubTask 7.1 Electrical Cabinets (Hall & Craighton Park)														

Exhibit B
 Compensation Schedule
 Gates Associates

PHASE & HOURLY SCHEDULE Cardozo Park Playground Renovation, Milpitas 6882089r reduced rates	GATES + ASSOCIATES					ELECTRICAL	CIVIL	GEOTECH	SubTotal
	Dave Gates Principal \$140/hr.	Todd Young Project Management \$140/hr.	Chuck Gardelle Job Captain \$85/hr.	Jeff Bradshaw Infrastion \$100/hr.	CADD Staff \$80/hr.				
TASK 1 - CONCEPT DESIGN									
SubTask 1.1 Project Initiation and Program	3	8							
SubTask 1.2 Existing Document Review	2	4	4	2					
SubTask 1.3 Field Reconnaissance	3	6	18	24					\$5,000.00
SubTask 1.4 Geotechnical Survey	3	3	6	6					
SubTask 1.5 Alternate Concept Plans	3	3	6	6					
SubTask 1.6 Concept Review	11	24	32	36					
SubTask 1.7 Final Concept Plan and Phase I									
Subtotal Fee	\$ 1,540.00	\$ 3,360.00	\$ 3,040.00	\$ 220.00	\$ 2,880.00	\$ 3,800.00	\$ 4,000.00	\$ 5,000.00	\$ 23,840.00
					\$ 11,940.00	\$ 3,600.00	\$ 4,000.00	\$ 5,000.00	\$
TASK 2 - PHASE I PRELIMINARY DESIGN									
SubTask 2.1 Phase I Kick-Off	3	3							
SubTask 2.2 Supplemental Survey									
SubTask 2.3 Horticultural Soils Test & Recs	4	12	40	4					\$ 900.00
SubTask 2.4 Design Plans (50% submittal)	3	3	3	3					
SubTask 2.5 Estimate of Probable Cost	2.5	12	38	8					
SubTask 2.6 Staff Review									
SubTask 2.7 95% Submittal	16	2	2	2					
SubTask 2.8 Technical Specifications	1	2	8	8					
SubTask 2.9 Estimate of Probable Cost	2	8	8	8					
SubTask 2.10 Permit Applications and Approvals	3	3							
SubTask 2.11 Staff Review	5	12							
SubTask 2.12 PRCRC and City Council Presentation	12.5	98	12	160					
Subtotal Hours	\$ 1,750.00	\$ 7,420.00	\$ 9,405.00	\$ 1,260.00	\$ 14,490.00	\$ 4,460.00	\$ 8,400.00	\$ 12,300.00	\$ 50,875.00
Subtotal Fee					\$ 34,735.00	\$ 4,400.00	\$ 12,300.00	\$	\$
TASK 3 - PHASE I FINAL DESIGN									
SubTask 3.1 Final 100% Submittal	16	24	2	2					
SubTask 3.2 Quality Control	3	3							
SubTask 3.3 Staff Review & Signing	0	19	27	2					
Subtotal Hours	\$ -	\$ 2,660.00	\$ 2,970.00	\$ 200.00	\$ 1,920.00	\$ 2,800.00	\$ 5,100.00	\$	\$ 15,650.00
Subtotal Fee					\$ 7,750.00	\$ 2,800.00	\$ 5,100.00	\$	\$
TASK 4 - BIDDING									
SubTask 4.1 Bidding Support Phase I	0	0	16	2					
Subtotal Hours	\$ -	\$ -	\$ 1,520.00	\$ -	\$ 160.00	\$ 400.00	\$ 300.00	\$	\$ 2,380.00
Subtotal Fee					\$ 1,680.00	\$ 400.00	\$ 300.00	\$	\$
TASK 5 - CONSTRUCTION ADMINISTRATION									
SubTask 5.1 Construction Administration	0	0	42	6					
SubTask 5.2 Playground Certification and Inspection	0	0	2	3					
Subtotal Hours	\$ -	\$ -	\$ 4,180.00	\$ 600.00	\$ 2,400.00	\$ 800.00	\$ 500.00	\$	\$ 6,320.00
Subtotal Fee					\$ 5,020.00	\$ 800.00	\$ 500.00	\$	\$
TASK 6 - PHASE I RECORD DRAWING									
SubTask 6.1 Record Drawings	0	0	0	0					
Subtotal Hours	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 200.00	\$ 200.00	\$	\$ 400.00
Subtotal Fee					\$ -	\$ 200.00	\$ 200.00	\$	\$
Reimbursable Allowance					\$ 59,665.00	\$ 12,400.00	\$ 22,400.00	\$ 5,000.00	\$ 102,465.00
SUBTOTAL									\$ 3,000.00
									\$ 102,465.00
TASK 7 - ELECTRICAL CABINETS									
SubTask 7.1 Electrical Cabinets (Hall & Creighton Park)	0	0	0	0					
Subtotal Hours	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 32	\$ -	\$ -	\$ 4,000.00
Subtotal Fee					\$ -	\$ 4,000.00	\$ -	\$ -	\$ 4,000.00
SUBTOTAL									\$ 106,465.00
Contingency									\$ 110,900.00
TOTAL									\$ 110,900.00

Rate schedule for City of Milpitas, Cardoza Park
Effective through July 2010

Progress billing for services rendered invoiced on monthly basis

Additional Services

I. Hourly Fees

Hourly Fees for Services of:	Rate Per Hour:
Principal	\$140.00
Associate Landscape Architect	\$115.00
Sr. Landscape Architect	\$95.00
Jr. Landscape Architect	\$90.00
Sr. Landscape Designer	\$90.00
Landscape Designer	\$85.00
Design Technician	\$80.00
Irrigation Designer	\$100.00
Irrigation Technician	\$80.00
Sr. Visual Communications Designer	\$100.00
Visual Communication Designer	\$90.00
Administrative Staff	\$75.00

II. Expenses (Reimbursables)

- A. Consultants at approximately the same rates indicated above or on consultant fee schedules.
- B. Other direct expenses considered ordinary and necessary at cost which may include:
 - 1. Printing and reproduction costs.
 - 2. Postage, delivery and overnight shipping costs.

Hourly rates may be adjusted on July, 2010 and shall apply for any services rendered after that date.



EXHIBIT C
INSURANCE DOCUMENTS