

City of Milpitas, California

**BUDGET CHANGE FORM**

Type of Change	From		To	
	Account	Amount	Account	Amount
Check one:				
<input checked="" type="checkbox"/> Budget Appropriation	390-2940	\$ 317,310	390-116-4237	\$ 317,310
<input type="checkbox"/> Budget Transfer				

**Explain the reason for the budget change:**

Check if City Council Approval required. Meeting Date: April 20, 2010

**Background:** On March 2, 2010 the City Council unanimously selected Group 4 Architects for the proposed Milpitas Silicon Valley Conference Center. Deliverables for the first phase will be to complete a Market Demand Study to determine the types of uses, other than a meeting room to seat more than 350 persons, which could be included in the project. Group 4 will work with Convention Sports and Leisure (CS&L) for the first task. Their work includes a similar study for the South San Francisco Conference Center and more recently the San Francisco 49ers in their evaluation of a Santa Clara stadium.

If the Council determines, after the Market Study is completed, to proceed with the remaining tasks to complete the feasibility planning and design for the proposed conference center at 540 and 570 Alder Drive, the additional work will be able to proceed without delay. Staff negotiated a scope and fee for the complete Feasibility Analysis and Design with Group 4, including the Market Demand Study, for a total not to exceed \$317,310.

**Fiscal Impact:** Funds for the proposed contract of \$317,310 are within the unencumbered Redevelopment Agency Fund Balance.

**Recommendation:** Approve a Contract with Group 4 Architecture, Research + Planning, Inc. Feasibility Analysis and Design of the proposed Milpitas Silicon Valley Conference Center.

Itemization of funds, if needed:			Amount
Requested by:	Division Head:	Date:	
	Department Head: <i>[Signature]</i>	Date: 4/12/10	
Reviewed by:	Finance Director: <i>[Signature]</i>	Date: 4/9/10	
Approved by:	City Manager:	Date:	
Date approved by City Council, if required:		Confirmed by:	

**CONSULTING SERVICES AGREEMENT BETWEEN  
THE REDEVELOPMENT AGENCY OF THE CITY OF MILPITAS AND  
GROUP 4 ARCHITECTURE RESEARCH + PLANNING, INC.**

THIS AGREEMENT for consulting services is made by and between the Redevelopment Agency of City of Milpitas ("Agency") and Group 4 Architecture Research + Planning ("Consultant") as of April \_\_\_\_, 2010.

**AGREEMENT**

**Section 1. SERVICES.** Subject to the terms and conditions set forth in this Agreement, Consultant shall provide to Agency 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 December 31, 2010, 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 Agency'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 professional 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 Agency, 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 Agency of such desire of Agency, 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.** Agency hereby agrees to pay Consultant a guaranteed maximum price not to exceed Three Hundred Seventeen Thousand Three Hundred Ten Dollars (\$317,310.00) for all services to be performed and reimbursable costs incurred under this Agreement. Agency 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 Agency to Consultant for services rendered pursuant to this Agreement. Consultant shall submit all invoices to Agency in the manner specified herein. Except as specifically authorized by Agency, Consultant shall not bill Agency for duplicate services performed by more than one person.

Consultant and Agency acknowledge and agree that compensation paid by Agency 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. Agency 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 percentage of completion or the cost for services performed, depending on whether Lump Sum or Time and Materials as stipulated in Exhibit B, 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 Agency's option and as a billable expense of Consultant, 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;
- For Time and Material Tasks billed at an hour rate 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.** Agency shall make monthly payments, based on invoices received, for services satisfactorily performed, and for authorized reimbursable costs incurred. Agency 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 Agency to pay Consultant. In the event that an invoice is not acceptable to the Agency, said invoice shall be returned to Consultant within thirty (30) days of the Agency's receipt of the invoice with a detailed

explanation of the deficiency. Agency's obligation to pay a returned invoice shall not arise earlier than thirty (30) days after resubmission of the corrected invoice. After receipt of a compliant invoice, the Agency shall pay to Consultant 1.5% monthly interest on unpaid balances related to that invoice within 90 days. This does not apply to payments withheld or unpaid due to non-performance of Consultant.

- 2.3 **Total Payment.** Agency shall pay for the services and expenses to be rendered by Consultant pursuant to this Agreement. Agency shall not pay any additional sum for any expense or cost whatsoever incurred by Consultant in rendering services pursuant to this Agreement that are above and beyond the Scope of Service approved by the Agency.. Agency 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 Agency 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 Twenty Six Thousand Nine Hundred Dollars (\$26,900). Expenses not listed in Exhibit B are not chargeable to Agency. Reimbursable expenses are included in the total not-to-exceed amount of compensation provided under this Agreement.
- 2.6 **Additional Services.** This Agreement includes a Contingency Amount not to exceed Ten Thousand Dollars (\$10,000). No Payment for Additional Services will be allowed unless the Agency Authorizes Consultant in writing in advance of the performance of the Additional Services. Additional Services, if any, shall be preformed for mutually agreed upon rates or they shall be performed on a Time and Material basis not to exceed the amount authorized for those services. Rates shall be as indicated in Exhibit B.
- 2.7 **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.
- 2.8 **Payment upon Termination.** In the event that the Agency or Consultant terminates this Agreement pursuant to Section 8, the Agency 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 Agency shall have no obligation to compensate Consultant for work not verified by logs or timesheets.

- 2.9 **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 Agency.

**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. Agency shall make available to Consultant only the facilities and equipment listed in this section, and only under the terms and conditions set forth herein.

Agency shall furnish physical facilities such as desks, filing cabinets, and conference space, as may be reasonably necessary for Consultant's use while consulting with Agency employees and reviewing records and the information in possession of the Agency. The location, quantity, and time of furnishing those facilities shall be in the sole discretion of Agency. In no event shall Agency 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 except professional liability which is "claims made" 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 Agency of such insurance that meets the requirements of this section and under forms of insurance satisfactory in all respects to the Agency. Consultant shall maintain the insurance policies required by this section throughout the term of this Agreement and shall produce said policies to the Agency 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 Agency. 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 Agency 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 Agency and its officers, officials, employees, and volunteers for loss arising from work performed under this Agreement.

A certificate of insurance 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 mail has been given to the Agency.

#### 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, if any, 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) Codes 8 or 9 ("any hired and non-owned autos"). 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. 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 Agency 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 Agency and its officers, officials, employees, contractors, consultants, and volunteers, and that no insurance or self-insurance maintained by the Agency 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 AGENCY 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 Agency.

**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** A certificate of insurance 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 mail has been given to the Agency.

**4.3.3** This section is deleted intentionally.

**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 Agency.

- c. A copy of the claim reporting requirements must be submitted to the Agency 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 Agency 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 Agency 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 Agency for the self-insured retentions and deductibles that exceed \$150,000 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 Agency, Consultant may increase such deductibles or self-insured retentions with respect to Agency, its officers, employees, agents, contractors, consultants, and volunteers. The Agency 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 Agency.

- 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 Agency 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 Agency may have if Consultant fails to provide or maintain any insurance policies or policy endorsements to the extent and within the time herein required, Agency may, at its sole option exercise any of the following

remedies, which are alternatives to other remedies Agency 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 Agency 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 Agency and hold harmless the Agency and its officials, officers, employees and volunteers from and against any and all claims arising out of the performance of Consultants services on this project that arise out of and that pertain or relate to the negligence, recklessness, or willful misconduct of Consultant or its employees, sub-consultants, or agents to the extent that such liability is actually caused by the negligence, recklessness or willful misconduct of Consultant, its principals, employees or sub-consultants. Consultant shall have no obligation to pay for any of the indemnitee's defense related costs in excess of \$100,000 prior to a final determination of liability or to pay any amount that exceeds the finally determined percentage of liability based upon the comparative fault of Consultant.

**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 Agency. Agency 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, Agency shall not have the right to control the means by which Consultant accomplishes services rendered pursuant to this Agreement. Notwithstanding any other Agency, 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 Agency, including but not limited to eligibility to enroll in the California Public Employees Retirement System (PERS) as an employee of Agency and entitlement to any contribution to be paid by Agency for employer contributions and/or employee contributions for PERS benefits.

- 6.2 **Consultant No Agent.** Except as Agency may specify in writing, Consultant shall have no authority, express or implied, to act on behalf of Agency in any capacity whatsoever as an agent. Consultant shall have no authority, express or implied, pursuant to this Agreement to bind Agency 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 Agency is bound by the terms of such fiscal assistance program, provided Agency has notified Consultant of the involvement of other entity or entities.
- 7.4 **Licenses and Permits.** Consultant represents and warrants to Agency 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 Agency 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 Agency.
- 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 Agency or this Agreement.

**Section 8. TERMINATION AND MODIFICATION.**

- 8.1 **Termination.** Agency may terminate this Agreement at any time and without cause upon 10 days prior 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. Agency, however, may condition payment of such compensation upon Consultant delivering to Agency 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 Agency in connection with this Agreement. Agency shall indemnify and hold harmless Consultant for any subsequent use of Consultant's work products.

Consultant may terminate this Agreement upon 30 days prior written notification for any breach of contract, including but not limited to non-payment of fees not due to Consultant non-performance.

- 8.2 **Extension.** Agency 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 Agency grants such an extension, Agency shall have no obligation to provide Consultant with compensation beyond the maximum amount provided for in this Agreement. Similarly, unless authorized by the Agency, Agency 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.** Agency 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 Agency 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 Agency. 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 Agency.

- 8.5 **Survival.** All obligations arising prior to the termination of this Agreement and all provisions of this Agreement allocating liability between Agency 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, Agency's remedies shall include, but not be limited to, any or all of the following:

8.6.1 Cancellation of the Agreement upon 10 days written notice;

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 Agency. Consultant hereby agrees to deliver those documents to the Agency at any time upon demand of the Agency. 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 Agency and are not necessarily suitable for any future or other use. Failure by Consultant to deliver these documents to the Agency within the time period specified by the Agency shall be a material breach of this Agreement. Agency and Consultant agree that, until final approval by Agency, all data, plans, specifications, reports and other documents are preliminary drafts not kept by the Agency 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 Agency 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 Agency. 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 Agency or as part of any audit of the Agency, 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 up to \$25,000. The court may set such fees in the same action or in a separate action brought for that purpose.

10.2 **Venue.** In an effort to resolve any conflicts or disputes that arise regarding the performance of this agreement, the Agency & Consultant agree that all such disputes shall be submitted to nonbinding mediation, using a mutually agreed upon mediation services experienced in the resolution of construction disputes. Unless the parties mutually agree otherwise, such mediation shall be a pre-condition to the initiation of any litigation. The parties agree to exercise good faith in scheduling the meditation.

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 Agency 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 Agency official in the work performed pursuant to this Agreement. No officer or employee of Agency 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 Agency. If Consultant were an employee, agent, appointee, or official of the Agency 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 Agency 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 Diana Barnhart, Economic Development Manager, who is authorized to act for, and on behalf of, Agency. 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 Schnee, Partner  
Group 4 Architecture Research + Planning  
211 Linden Avenue  
South San Francisco, CA 94080

Any written notice to Agency shall be sent to:  
Diana Barnhart, Economic Development Manager  
455 East Calaveras Boulevard  
Milpitas, California 95035

10.11 **Professional Seal.** Where applicable in the determination of the Agency, 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 Agency 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.

AGENCY OF MILPITAS

CONSULTANT

\_\_\_\_\_  
Thomas C. Williams, Executive Director

\_\_\_\_\_  
David Schnee, Partner

APPROVED AS TO CONTENT:

\_\_\_\_\_  
Taxpayer Identification Number

\_\_\_\_\_  
Diana Barnhart, Economic Development Manager

\_\_\_\_\_  
City of Milpitas Business License Number

APPROVED AS TO FORM:

\_\_\_\_\_  
Michael J. Ogaz, Agency Counsel

APPROVED:

\_\_\_\_\_  
Emma Karlen, Finance Director/Risk Manager

ATTEST:

\_\_\_\_\_  
Mary Lavelle, Secretary

EXHIBIT A  
SCOPE OF SERVICES

EXHIBIT B  
COMPENSATION SCHEDULE