

**A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF MILPITAS  
APPROVING PURCHASE OF SOFTWARE MANAGEMENT  
SERVICES FROM TIBURON, INC.**

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

**WHEREAS**, Tiburon, Inc. provided the records management system used by the Police Department and is the only source for the annual service and maintenance for the software and hardware; and

**WHEREAS**, Tiburon, Inc. has been providing annual service and maintenance for the Police records management system since 2000; and

**WHEREAS**, after conducting a good faith review of the available sources and pursuant to Milpitas Municipal Code Section I-2-3.09, the City’s Purchasing Agent has determined that Tiburon, Inc. is the only source for the service of the Police records management system in Santa Clara County.

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

1. The City Council has considered the full record before it, which may include but is not limited to such things as the staff report, testimony by staff and the public, and other materials and evidence submitted or provided to it. Furthermore, the recitals set forth above are found to be true and correct and are incorporated herein by reference.
2. The City Manager is authorized to execute a contract with Tiburon, Inc., as a sole source, for the annual service and maintenance of the Police records management system, for an amount not to exceed \$45,635.00.

PASSED AND ADOPTED this \_\_\_\_ day of \_\_\_\_\_, 2011 by the following vote:

AYES:

NOES:

ABSENT:

ABSTAIN:

ATTEST:

APPROVED:

\_\_\_\_\_  
Mary Lavelle, City Clerk

\_\_\_\_\_  
Jose S. Esteves, Mayor

APPROVED AS TO FORM:

\_\_\_\_\_  
Michael J. Ogaz, City Attorney

**TIBURON, INC.**

**AGREEMENT FOR EXTENDED SERVICE**

This Agreement effective March 28, 2000, is entered into by and between City of Milpitas, 1265 N. Milpitas Blvd., Milpitas, CA 95035 (hereinafter referred to as "CLIENT") and Tiburon, Inc. (hereinafter referred to as "TIBURON"), having its primary place of business at 39350 Civic Center Drive, Suite 280, Fremont, California 94538.

IT IS HEREBY AGREED:

WHEREAS, CLIENT has determined that it requires the categories of application software maintenance on the software systems which have been provided to CLIENT by TIBURON under a separate agreement (hereinafter the "PROGRAM"). These software systems are identified in Exhibit A, which is attached hereto and hereby incorporated by reference, and

WHEREAS, CLIENT requires the provision of professional and technical services and materials as specified in this Agreement, and

WHEREAS, TIBURON is qualified to provide the services and materials required by CLIENT as specified in this Agreement.

NOW THEREFORE, in consideration of the mutual covenants contained herein, CLIENT and TIBURON agree as follows:

1. PERIOD OF PERFORMANCE

The term under which TIBURON shall be obligated to perform under this Agreement shall be for the time period specified in Exhibit A, and shall continue for this time period or until this Agreement has otherwise been terminated as provided herein.

2. STATEMENT OF WORK

With respect to the PROGRAM, TIBURON shall perform the following maintenance services:

- a. TIBURON shall retain a copy of the original PROGRAM source code.
- b. If during the term of this Agreement, (1) CLIENT discovers defects in the PROGRAM such that the PROGRAM will not perform in accordance with the specifications as previously accepted by CLIENT, (2) CLIENT notifies TIBURON of such defects in writing; and (3) such defects are reproducible, then TIBURON shall provide timely corrections of such defects.
- c. If problems arise concerning the PROGRAM, TIBURON shall provide telephone assistance and support via remote dial-in.
- d. If remote support is available, but an on-site visit is required to correct the defect, TIBURON will travel to the site at no additional charge if the problem lies solely with TIBURON application software. If CLIENT is unable to provide remote dial-in and an on-site visit is necessary to correct the problem, TIBURON will bill for travel and per diem costs. If the problem is CLIENT generated, CLIENT is responsible for all fees and expenses and will be billed at TIBURON's current service rate in addition to all travel costs.
- e. TIBURON shall provide CLIENT with a quarterly status report to include a summary

of site activity and client requests.

- f. TIBURON shall provide a toll-free telephone service for routine operational and technical assistance.

Technical and operational service shall be available during TIBURON's normal support hours of 8:00 a.m. to 5:30 p.m. Pacific Time (excluding weekends and TIBURON holidays) and at additional times according to the terms defined in the Schedule of Services and Charges in Exhibit B which is attached hereto and hereby incorporated by reference.

- g. TIBURON shall provide software upgrades and enhancements as per the Schedule of Services and Charges attached hereto as Exhibit B. Any installation and special tailoring required shall be charged at the Technical Service Rate as identified in Exhibit B. All such software provided by TIBURON shall be covered by the terms of this Agreement.

If CLIENT has source code on-site, and corrections for reported problems or defects are due substantially to CLIENT's errors or CLIENT's changes to the system environment, or relate to CLIENT-modified portions of the PROGRAM or to portions of the PROGRAM affected by CLIENT-provided software, or if diagnosis of problems reported erroneously shall be performed by TIBURON, CLIENT will be charged at the Technical Service Rate, plus applicable travel and per diem expenses.

### 3. CLIENT RESPONSIBILITIES

CLIENT agrees to provide those services and facilities defined below which are necessary for the provision of services by TIBURON under this Agreement. CLIENT and TIBURON agree that the scope and schedule of services to be provided by TIBURON under this Agreement depend upon the timely fulfillment of CLIENT responsibilities.

- a. CLIENT shall assign a coordinator to ensure that CLIENT's duties set forth in this Agreement are met, to coordinate appropriate schedules in connection with TIBURON's services hereunder, and to provide other coordination activities which are necessary for TIBURON to perform its services hereunder. CLIENT shall maintain performance logs documenting trouble calls and availability of on-line systems according to procedures provided by TIBURON.
- b. CLIENT shall assign individuals who are familiar with the PROGRAM, and who are able to provide on-site technical assistance as required by TIBURON to aid TIBURON in performing its services. CLIENT personnel will screen operational assistance calls and handle operational problems where appropriate.
- c. CLIENT shall ensure that appropriate maintenance activities are carried out on a regularly scheduled basis in accordance with site documentation. This includes but is not limited to backing up the database and journal logs, purging out of date records and running reports and performing diagnostics as requested by TIBURON.
- d. CLIENT shall provide dial-in access to CLIENT's computer, making it accessible by TIBURON for remote service. CLIENT is responsible for the provision of all local equipment (dial-up modems, telephone termination, communications port, etc.) required to support access by TIBURON. If CLIENT has source code on-site, CLIENT shall also compile programs and run appropriate tests following each remote access as requested by TIBURON. In the event that CLIENT does not comply with these provisions, Technical Service charges as specified in Exhibit B shall apply.
- e. CLIENT shall meet with TIBURON as may be reasonably required to discuss

operational issues and the status of the PROGRAM and provide timely responses to issues related to maintenance and PROGRAM performance raised in writing by TIBURON.

- f. CLIENT shall update and maintain the input data as may be required for satisfactory PROGRAM operation, and be responsible for the accuracy of CLIENT-provided data.
- g. If CLIENT has source code, CLIENT shall provide TIBURON with a complete copy of the production source code in a format compatible with TIBURON's support environment so that TIBURON has ready access to the code for maintenance work. Complete replacement copies shall be made available on a timely basis upon request by TIBURON.
- h. If CLIENT has source code, CLIENT shall be responsible for storing a complete copy of the production source code off site as an emergency back up.

#### 4. PAYMENT

CLIENT shall make payments to TIBURON based on invoices submitted. Schedules and amounts of invoices shall be determined in accordance with Exhibit B.

#### 5. INDEPENDENT CONTRACTOR

Each party hereto, in performance of this Agreement, will be acting in its own capacity. The employees or agents of one party shall not be deemed or construed to be the employees or agents of the other party for any purpose whatsoever. TIBURON will be responsible for payment of payroll taxes, unemployment insurance, and similar obligations with respect to its own employees, and no deductions shall be made from payments due under this Agreement for that or any other related reason.

#### 6. LICENSE

With respect to each change, correction, or enhancement to PROGRAM furnished to CLIENT under this Agreement, TIBURON grants to CLIENT a perpetual, non-exclusive, non-assignable, non-transferable license to use such change, correction, or enhancement solely as part of the PROGRAM.

#### 7. CLIENT MODIFICATIONS

If CLIENT has source code on-site, CLIENT shall not make any changes or modifications to TIBURON application software or to application software operating environment without TIBURON's prior written authorization. Any such changes without TIBURON's prior written authorization shall be deemed unauthorized and in violation of the terms and conditions of this Agreement.

At no additional cost to CLIENT, TIBURON shall provide updates to the TIBURON External Interface Software and/or documentation, including all existing screen formats currently supported by TIBURON, for all legal requirements or modifications mandated by NCIC, or the CLIENT's respective State, when such requirements or modifications require a programming/source code change to the Licensed Software. Changes mandated or offered by CLIENT's respective City and/or County are not covered. Changes to State and/or NCIC protocols are considered outside the scope of this Agreement.

8. CONFIDENTIAL INFORMATION

TIBURON shall regard all CLIENT files and data as CLIENT's confidential information. TIBURON shall not release said data to outside parties without written consent of CLIENT. To the extent allowed by law, CLIENT shall regard all software and documentation provided by TIBURON as confidential information. CLIENT shall not release or provide access to said software and documentation to outside parties without written consent of TIBURON.

9. TERMINATION

This Agreement may be terminated by either party by giving at least a ninety (90) day advance written notice to the other party.

Upon termination of this Agreement for any reason, the provisions relating to Confidential Information and License shall survive.

10. INSURANCE

TIBURON shall, at its own expense, at all times while TIBURON is performing services at CLIENT's facilities, maintain in force:

- a. A comprehensive general liability insurance policy including coverage for contractual liability for obligations assumed under the contract documents, blanket contractual liability, products and completed operations and owner's and contractor's protective insurance; and
- b. Comprehensive automobile liability insurance policy including owned and non-owned automobiles; and
- c. Liability coverage shall be equal to or greater than the limits for claims made under the California Tort Claims Act with minimum coverage of \$1,000,000 per occurrence (combined single limit for bodily injury and property damage claims) or \$500,000 per occurrence for bodily injury and \$1,000,000 per occurrence for property damage. Liability coverage shall be provided on an "occurrence" basis. "Claims made" coverage will not be acceptable.
- d. The City, including its officers, employees, and volunteers, shall be named as additional insured on the required insurance policies.

Certificates of insurance acceptable to CLIENT shall, upon request, be filed with CLIENT, prior to the commencement of any services at CLIENT facilities by TIBURON. Each certificate shall provide that coverage under the policy cannot be canceled and restrictive modifications cannot be made until at least 30 days prior written notice has been given to CLIENT.

11. AMENDMENTS

This Agreement may be amended upon mutual written agreement by CLIENT and TIBURON to include, but not be limited to, additional services and support, continuation of maintenance of the equipment and software, replacements, and upgrades.

12. APPLICABLE LAW

This Agreement shall be construed in accordance with and governed by the laws of the State of California.

13. LIMITATION OF LIABILITY AND REMEDIES

a. Limited Warranty

While this Agreement is in effect, TIBURON warrants that all computer programs developed or provided under Section 2(g) of this Agreement will conform to such applicable specifications as may be developed under this Agreement.

THE ABOVE WARRANTY IS IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.

b. Limitation of Damages and Remedy

TIBURON's liability hereunder for damages shall not exceed the annual maintenance charge paid to TIBURON for the period in which the cause of action occurred. In no event shall TIBURON be responsible for any indirect, consequential, incidental, or tort damages.

14. INDEMNIFICATION

Subject to the conditions and exceptions recited in this section, TIBURON shall defend and indemnify CITY against so much of any claim, suit, action or proceeding ("Claim") alleging that software supplied by TIBURON to CITY under this Agreement infringes a valid U.S. patent or valid U.S. copyright and TIBURON agrees to pay all reasonable litigation and settlement costs and attorney's fees incurred by CITY in connection with any such Claim. This indemnity will not apply unless CITY (1) gives written notice to TIBURON within fifteen (15) days of receipt of service of any such Claim and informs TIBURON in writing of any subsequent communications regarding the Claim; (2) fully cooperates with TIBURON in the defense of the Claim; and (3) provides TIBURON with information and assistance in defending the Claim. TIBURON shall have sole control of the defense of the Claim and of all negotiations for its settlement or compromise. IN NO EVENT SHALL TIBURON BE LIABLE FOR ANY LOSS OR DAMAGES RELATED TO THE OPERATION, DELAY OR FAILURE OF SOFTWARE OR EQUIPMENT PROVIDED BY TIBURON OR FOR THE ACCURACY OR COMPLETENESS OF DATA, AND UNDER NO CIRCUMSTANCES SHALL TIBURON BE LIABLE FOR SPECIAL, INCIDENTAL OR CONSEQUENTIAL DAMAGES.

TIBURON agrees to indemnify, defend and hold harmless CITY, its officers and employees from all costs, expenses, claims, suits, judgments, demands, causes of action, losses, liabilities or damages arising out of any negligent act or willful misconduct on the part of TIBURON, TIBURON's officers, employees, agents, and subcontractors in the performance of the duties identified herein. No undertaking of TIBURON in this section shall apply to any infringement or misappropriation or any claim of infringement or misappropriation or claim which arises solely from TIBURON's adherence to CITY's written instructions or directions or which arises solely from the use of CITY equipment or the System(s) and/or software provided by Tiburon hereunder with equipment, devices or software not supplied by TIBURON other than commercial merchandise which is available on the open market with which System is designated to operate and identified in advance on the Statement of Work.

CITY shall give TIBURON prompt notice of any claims of such infringement or misappropriation and of all suits and full opportunity and authority to assume the sole defense thereof, where TIBURON is obligated to indemnify CITY hereunder, including appeals, and to settle such suits, and shall furnish upon TIBURON's request and at TIBURON's expense all disclosure information and reasonable assistance available to CITY.

CITY agrees to indemnify, save and hold TIBURON harmless from any and all Claims for injury or damage of any nature arising out of or as a result of any negligent act or omission of CITY, its Employees, Council Members, Officers, or Agents, in connection with implementing, providing, or operating the System."

15. ENTIRE AGREEMENT

This Agreement sets forth the entire understanding between the parties as to the subject matter hereof and merges all prior discussions between them, and neither party shall be bound by any prior representations, conditions, understandings, or warranties except for original system warranties or those expressly provided herein, or in any surviving terms of prior written agreements between the parties hereto, or in any written agreements signed by representatives of the parties on or subsequent to the date of this Agreement. No provision appearing on any form originated by CLIENT shall have any force or effect unless such provision is expressly accepted in writing and signed by a representative of TIBURON.

IN WITNESS WHEREOF, the parties have hereunto set their hands on the dates set forth below.

CLIENT

Thomas J. Wilson  
Signature of Authorized Representative

Thomas J Wilson  
Name

City Manager  
Title

9-8-00  
Date

TIBURON

CEE H B JR *878*  
Signature of Authorized Representative

Charles H. Bridges Jr.  
Name

Vice President and Chief Financial Officer  
Title

August 7, 2000  
Date

**APPROVED**

DATE 8/23/00

Patrick Whitwell  
Asst. CITY ATTORNEY



**EXHIBIT B**  
**TO THE AGREEMENT FOR EXTENDED SERVICE**  
**SCHEDULE OF SERVICES AND CHARGES**

Support and Maintenance provided to the CLIENT listed in Exhibit A shall be pursuant to the terms and conditions of the Agreement for Extended Service dated March 28, 2000 (the "Agreement").

Upon CLIENT's payment of the amount set forth on Exhibit A to the Agreement, this Exhibit B shall be attached to, and become part of the Agreement. Any changes to the services options selected in this Exhibit B shall be reflected in a new Exhibit B which, upon payment of any additional amounts due, shall be attached to, and become part of, the Agreement.

**BASIC SERVICES**

Tiburon will provide basic services as defined in the Statement of Work contained in Section 2 of the Extended Service Agreement for the software systems as defined in Exhibit A.

Support for Computer Aided Dispatch, Message Switch and Corrections Management Systems is 24 hours per day, 7 days per week. Support for other products is from 8:00 a.m. to 5:30 p.m. Pacific Time, excluding weekends and normal Tiburon holidays, unless the "24/7" Service Option is selected. In all cases, call-out charges will apply as described below.

The following is paraphrased from the recently adopted Bylaws.

Voting membership in the Tiburon User Group, as set forth herein, is included in the Basic Service. The quantity of voting members is based on the number of Tiburon products installed, with the appropriate software licenses, at the CLIENT. For purposes of establishing voting memberships, a product is defined as SS/2000 – Computer Aided Dispatch, Police Records Management, Fire Records Management, Correction Management System, and Mobile Data System. The Tiburon User Group Conference is held annually at a location to be determined.

**"24/7" SERVICE OPTION**

\$7,000 per year/per system

\_\_\_\_\_  
(Initial)

Products not normally covered by 24-hour support may optionally be supported with 24-hour coverage (including Tiburon holidays). Applicable call-out charges continue to apply. If this option is not in force, technical support requests outside of covered hours are charged at technical service rates as defined below.

**NEW PRODUCTS**

Additional Tiburon software systems, subsystems and Tiburon provided third-party products, such as hardware, and networking software may be acquired under this Agreement. Tiburon installation, special tailoring, license fees and third-party peripherals required shall be charged at the then current Technical Services Rate or as quoted by Tiburon or the third party.

## TECHNICAL SERVICE RATES

### 1. Technical Service Rates

Technical Services Rates shall be invoiced to CLIENT as incurred at the rates then in effect.

A minimum of four (4) hours per occurrence will be charged for work conducted at Tiburon facilities and a minimum of eight (8) hours at CLIENT site for Technical Services not covered under Basic Services or "24/7" Service Option as described previously.

### 2. Materials, Travel and Per Diem Expenses

When applicable, all special materials, plus travel and per diem expenses shall be charged to CLIENT at cost.

### 3. Call-Out Charges

Systems not covered under 24/7 support, call-outs will be billed at \$250 per call. After the first hour, the rate is \$250 per hour with a two-hour minimum.

If CLIENT's systems are covered under the 24/7 support, the off-hour call-out fee is \$50.

### 4. Remote Access

All charges in this Agreement are predicated on CLIENT providing the required hardware, software, and operating environment for dial-in service. If CLIENT does not provide this support for dial-in service, the following additional charge will apply:

\$500 per month per system supported

In addition, travel and per diem expenses for on-site support required due to lack of remote access will be charged as defined in Exhibit B, page 2, item 1.